Supreme Court, U.S.
FILED

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In The
SUPREME COURT OF THE UNITED STATES

PERCY HOGAN,
Petitioner,
vs.
MARVIN T. RUNYON, JR., Postmaster
General, UNITED STATES POSTAL
SERVICE, SIMON MOLINA, et al.
Respondents.

Petition for a Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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1958

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial judge's usurpation of the fact-finding function of the jury, by rationalizing acts that the employee, other supervisors and coworkers reasonably believe to be racially discriminatory, under the hubris of "not constituting racial discrimination as a matter of law," is a violation of due process and equal protection of the law?

II. Whether the term "similarly situated" is an employee classification or an arbitrary term?

III. Whether a defendant in a racial discrimination lawsuit meets its stage two burden, as set forth in McDonnell-Douglas v. Green, 411 U. S. 792 (1973), when it does not produce any document, exhibit, affidavit or testimony in support of what it claims to be its legitimate, nondiscriminatory reason to support its actions?

IV. Whether the outstanding performance evaluations of an employee, supported by testimony, affidavits and exhibits and based upon objective criteria by several supervisors can be lawfully rejected by a lower court judge, who rules that a single supervisor's, (who admits lying in an earlier performance evaluation of the same employee), "perceptions"-unsupported by testimony, affidavits, documents or exhibits, are sufficient to eliminate any factual dispute and warrant summary judgment?

V. Whether, in a lawsuit involving allegations of racial discrimination, a lower court judge violated plaintiff's due process and equal protection rights, by disregarding the inferences provided by law, against a defendant, who destroys and conceals material evidence?

VI. Whether it is the lawful role of the lower court judge to create a factual dispute, using speculative information and innuendo that are not a part of the record, when the defendant has not raised a factual dispute, and then hold that the plaintiff has not met his burden of disproving the concocted factual dispute?

VII. Whether an "agent" of an "employer" is subject to individual liability under Title VII?

VIII. Whether the same conduct, as defined by legal precedent, that constitutes sexual discrimination, also constitutes racial discrimination.

LIST OF PARTIES

PERCY HOGAN,

MARVIN T. RUNYON, JR., Postmaster General

UNITED STATES POSTAL SERVICE

SIMON MOLINA

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OPINIONS BELOW

(i) No opinions were officially or unofficially reported in this case by any court or administrative agency.

(ii) The Ninth Circuit Court of Appeals entered an order affirming the opinion of the lower court, on July 20, 2001. A petition for panel rehearing and the petition for rehearing en banc were denied on January 17, 2002.

(iii) The clerk of the United States Supreme Court, on March 28, 2002, notified Percy Hogan that Justice O'Connor extended the time for filing the petition for a writ of certiorari "to and including May 17, 2002."

Statement of Jurisdiction

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment of the United States Court of Appeals by Writ of Certiorari is Title 28 U.S.C. #1257.

Statute Involved

The statutory provisions involved in this case are Title 42 U.S.C. (2000e), et seq., as amended by the Civil Rights Act of 1991 and 42 U.S.C. (1983).

STATEMENT OF THE CASE

a. Background

I worked in what is sometimes referred to as a "pressure cooker"-a huge, 3-football field sized room where tons of all types of mail was collected, bar-coded, sorted, cased and redistributed in a matter of hours. It was a noisy, dirty and hazardous area. There was intense pressure to get the mail out. There were many disgruntled regular-employees, engaged in a work slow down (strike) (App. P. 126-27).

Casual employees had been brought in to break the strike. They worked under 3-month contracts. Postal Service required a supervisor's favorable recommendation, before renewing a casual employee's contract.

I am Percy Hogan, Jr., (hereinafter referred to as "Hogan"). Postal Service re-hired me 5 consecutive times between November 1992 and June 1994 to work as a "casual employee." (See DKT #93, Vol. II, P. N-13, N14). Hogan worked at the "General Mail Facility" for the month of December 1992, as a "Christmas casual." He went to work in the section for manual sorters at the Rio Salado facility in June of 1993, under John Moore, Chief of Distributions, and veteran supervisors John Camu, Luz Gonzalez and Al Hansen.

There were, at least, 40 "regular employees" on the distribution floor, during Hogan's shift (from 3:30 p.m. to 12:00 a.m.) Hogan worked directly with 10 regular and 7 casual employees as a unit. Hogan was 1 of 2 black casual workers.

On October 1, 1993, Postal Service divided the work on the floor, naming supervisor-trainee Simon Molina as supervisor of Hogan's unit. Simon Molina, (hereinafter referred to as "Supervisor Molina"), spent 6 months, training for the position (May to October 1993). Hogan's group of casual employees was the first group given to Supervisor Molina. (See "Brief for Appellant" [9th Cir. Crt] ER. Vol. III, P. 1504, 1505).

Even after Supervisor Molina took over the unit, the senior supervisors regularly bypassed him and called Hogan to work overtime. They considered Hogan the best employee in the unit. Hogan started work at 3:30 p.m. and often worked 10-12 hour days), depending on the workload under the other supervisors (App. P. 144). He worked between 20-30 hours per week, under the direct supervision of the more experienced supervisors.

Supervisor Molina, a Mexican, treated black workers less favorably than similarly situated white and Mexican workers. He created a hostile, intimidating and abusive work environment for Hogan.

Whenever there was a problem, such as an overflow of mail on a sorting line or back log of mail in the MAZE, etc., the senior supervisors always sent all of the casual workers to fix it. When he took over supervision, Molina discriminated in assigning work. He required the 2 black employees, Hogan and Kyle Johnson, to do all of the dirty work that no one else wanted to do. This would happen every night (App. P. 128, Par. 1).

Supervisor Molina targeted, stalked and harassed Hogan, throughout the period he supervised Hogan (App. P. 131, Par. 2). Because Supervisor Molina's boss and every senior supervisor liked Hogan's work ethic and depended on him to get the mail out, Molina was unable to come up with any pretext to fire Hogan. Hogan received 10 highly favorable recommendations for rehire from his supervisors, including Molina (App. DKT #93, Vol. II, p. N-13, N-14).

Postal Service only allowed "casuals" to work two three-month appointments per calendar year. Therefore, Hogan would not be eligible to work as a casual employee for the remainder of the calendar year 1994, after he completed his casual term in June 1994.

In May 1994, a month before Hogan's casual appointment was to expire, his supervisors, including Molina, said they wanted to keep him as an employee. They discussed various options:

1. Having passed the civil service exams, Hogan qualified for regular employment, but hat could take over 2 years.

2. Hogan could remain on the casual recall list and return to work in January 1995.
3. Postal Service could re-appoint Hogan as a "transitional employee" (TE) with a two-year contract.
4. Another possibility was the Veterans' Readjustment Appointment Program (VRA). In May 1994, Postal Service posted notice of this affirmative action program, designed by Congress to give veterans interested in full-time employment, preference in hiring. Postal Service instructed supervisors not to submit any application for casual employees not recommended for rehire (App. P. 142).

Hogan, a Vietnam veteran, was the only one in his unit who met all of the listed requirements to apply for the VRA program (see DKT #93, Vol. II, P. N-17). All of his supervisors, including Supervisor Molina, encouraged Hogan to apply for the VRA program. Supervisor Molina submitted Hogan's application on May 27, 1994.

Yet, on June 29, 1994, when Hogan's casual employment term expired, Postal Service dropped him from the casual recall list and refused to rehire him. Why did Postal Service refuse to rehire Hogan? He had 10 highly favorable recommendations for rehire from his supervisors. He was never disciplined for any reason. He even trained supervisors and other employees. Every supervisor supported his bid for rehire under the VRA program.

In July 1994, Hogan inadvertently learned that a dishonest performance evaluation, written by Supervisor Molina, caused Postal Service to refuse to rehire him. The performance evaluation accused Hogan of being a marginal worker, who required constant supervision, left his work station without authorization and was constantly distracted from his duties (App. P. 120).

On August 15, 1994, Hogan filed a complaint of racial discrimination with Postal Service's Equal Employment Opportunity (EEO) office. EEO, on February 7, 1996, filed its

"Final Agency Decision," saying that Hogan *"failed to prove a prima facie case of discrimination based on race . . . ."* It issued a *"Notice of Right to File Civil Action"* in a federal district court within 90 days (see DKT #93, Vol. II, P. 0-3).

Later, Hogan learned that EEO failed to compare Hogan and his similarly situated coworkers to ascertain if there was a disparity in the treatment, based on race or national origin (see DKT #93, Vol. II, P. N-1, N-20).

b. Procedural History

Hogan sued Postal Service, Supervisor Molina and Marvin J. Runyon, on May 16, 1996. Hogan, acting pro se, is seeking back pay, monetary damages, declaratory and injunctive relief, pursuant to ***42 U.S.C. (2000e), et seq., as amended by the Civil Rights Act of 1991, 42 U.S.C. (1983)***. Hogan filed a pendant state law claim for intentional infliction of emotional distress.

On June 24, 1996, Hogan filed an Amended Complaint, with a jury trial demand. On January 16, 1997, he filed a "Second Amended Complaint."

Postal Service and Marvin J. Runyon filed an Answer to the Complaint on March 12, 1997. The court assigned the lawsuit to the Honorable Roslyn O. Silver.

Postal Service did not comply with the court's Scheduling Order. It did not disclose the names or addresses of potential witnesses, identify documents or other things, or identify about 139 employees who worked in Hogan's unit. Postal Service continued its improper behavior, by failing to respond to Hogan's discovery requests (App. P. 47).

On February 9, 1998, Hogan filed a Motion to Compel Postal Service to make initial disclosures and respond to discovery. Postal Service filed a Motion to Strike Hogan's motion (see DKT #41, 42).

On February 17, 1998, Judge Silver entered an order striking Hogan's Motion to Compel (see DKT #43). When Attorney Mayfield still did not send the response as promised, Hogan contacted him and asked why the information still had not been provided. Attorney Mayfield told Hogan *"If you don't have the information you need, then drop the case."*

On March 2, 1998, Postal Service filed a Motion to Dismiss Supervisor Molina, the Attorney General and United States Post Office. Postal Service did not explain why it disregarded the time limitations for filing the motion, as set by the Court (see DKT #44).

Hogan moved the court to strike the Motion to Dismiss for noncompliance with the court's "Scheduling Order." The court ruled that, though Postal Service's motion was clearly time-barred, Hogan (a displaced worker trying to regain his good reputation and provide for his family) was not prejudiced by Postal Service's (unexplained) delay (App. P. 2).

On March 6, 1998, more than 100 days after the due date, Postal Service responded to Hogan's discovery requests. Its responses were evasive, non responsive and incomplete.

On April 1, 1998, Postal Service filed a Motion for Protective Order. The motion says: *Currently, defense attorney has information in his possession that has been requested. . . . The release of this personal information may violate the Privacy Act because it will contain the names and last known addresses of Postal Service employees. . . .* (see DKT #48, 49).

On April 2, 1998, with Hogan's consent, the Court granted the Motion for Protective Order. Yet, Attorney Mayfield still did not produce any of the information the Motion for Protective Order assured the court he would produce.

Hogan wrote several letters to Attorney Mayfield, again requesting cooperation. On August 13, 1998, Postal Service filed Supplemental Responses to Hogan's discovery requests. This is when Attorney Mayfield informed Hogan that Postal Service would not produce records of "casual employees" because it had already destroyed those records (App. P. 53, Exh 26).

In destroying those records, Postal Service violated its own

Administrative Support Manual (ASM) which requires that Postal Service retain the schedules in question for at least 3-years. Postal Service destroyed those records, which are material evidence in this lawsuit, a year earlier than authorized by Postal Service's ASM and in spite of this lawsuit (see "Brief for Appellant" [9th Cir. Crt], p. 65, ER Vol. II, Par. 6, L. 23, also Par. 7 or DKT #62).

Postal Service did not explain why it did not provide any information about "regular" employees.

Hogan requested a status conference to resolve the discovery dispute. The Court ordered Postal Service to file affidavits: ". . . *concerning his previous responses where he stated that records did not exist. An affidavit must be provided why the records do not exist. And if he stated that a supplement will be coming, well, until the close of discovery, he has the obligation to provide the supplement. . . .*"

On August 31, 1998, within an hour after the conference ended, Attorney Mayfield, demanded, for the first time since Hogan sued in 1996, that Hogan submit to a deposition. The Court, however, had not authorized Postal Service to take Hogan's deposition or extend the discovery deadline to allow for new discovery. The court had only authorized the parties to resolve those discovery issues that existed before the close of discovery.

On September 8, 1998, Postal Service served a Notice of Deposition, requiring Hogan to travel from Pittsburgh, Pennsylvania to Phoenix, Arizona for a deposition (DKT #60).

On September 17, 1998, Hogan filed a Motion for a Protective Order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Hogan sought protection from undue burden and expense, after the time permitted by the court's Scheduling Order for discovery (DKT #65).

On September 18, 1998, Postal Services filed a Motion in Limine. Postal Service tried to limit the issues to those its EEO chose to investigate and not to those complained of (DKT #68, 76).

Attorney Mayfield, served an affidavit from Nancy Rodriquez, saying: . . . *If just a name is provided and that person worked for the postal service within the past 18 months, the name can be queried on the personnel computer system, and the social security number can be located. However, without a social security number of an individual, the specific clock rings cannot be located* (see "Brief for Appellant" [9th Cir. Crt], ER. Vol. II, P. 4, L. 1-4).

On September 15, 1998, Postal Service sent Hogan "clock rings" for 2 "casual" employees. Postal Service had the list of employees Hogan gave them. Yet, it still did not produce the "clock rings" or any other information about identified regular employees, as ordered by the court. Postal Service did not produce any of the "addresses" that Attorney Mayfield told the court he had in his possession. Postal Service did not provide Hogan with any records pertaining to "Christmas casual" employees, as requested.

On December 10, 1998, Postal Service filed a Motion for Partial Summary Judgment. The motion argued that: (1) since Hogan never requested time off, he cannot prevail on the issue of disparate treatment regarding time off; (2) since Hogan never complained to Molina's supervisors, Postal Service must prevail on the issue of employer knowledge; and 3) Hogan relied on his subjective belief that he was a victim of racial discrimination.

On February 3, 1999, Postal Service filed another Motion for Partial Summary Judgment, arguing that Hogan did not present a prima facie case and that Hogan was denied the positions because his negative performance evaluations were justified.

On February 11, 1999, Judge Roslyn O. Silver held that Hogan is not entitled to punitive damages (App. P. 38-40). The court relied upon **Brown v. General Services Administration**, 425 U.S. 820, 96 S.Ct. 1961 (1976); **Brock v. United States**, 64 F.3d 1421, 1423 (9th Cir. 1995); **Brazil v. United States Department of Navy**, 66 F.3rd 193, 197 (9th Cir. 1995) to support its conclusion that defendant's "wrongs [were not] sufficiently egregious," because they were not "highly personal wrongs of the type discussed above. . . .(discussing sexual harassment)" Judge Silver, without explanation, dismissed Supervisor Molina as a defendant, leaving the Postmaster General as the only defendant (App. P. 40).

Hogan filed a timely Motion for Reconsideration. The court denied Hogan's Motion for Reconsideration.

Though Hogan answered Postal Service's March 1, 1999 second motion for summary judgment, Postal Service filed another document (it titled a "Reply to Response to Second Motion for Partial Summary Judgment"), rearguing its "Motion for Partial Summary Judgment" filed on February 3, 1999. Hogan filed "Plaintiff's Brief in Opposition to Defendant's Second Motion for Partial Summary Judgment."

This Court's decision in **Kolstad v. American Dental Association**, 79 Fari Emp. Prac Cas. (BNA) 1697 (1999); Cite as 1999 WL 407481, *1 (U.S.), [decided June 22, 1999], showed that the lower court judge misapprehended the term "egregiousness," in excluding Hogan's state tort law claims in its February 11, 1999 order. Therefore, on February 7, 2000, Hogan filed a Motion to Amend the Complaint. By then, the case had been re-assigned to Judge William G. Young.

On July 3, 2000, Hogan filed a Motion in Limine and for Sanctions, because Postal Service continued to refuse to provide requested documents. This refusal prejudiced Hogan's ability to prove or disprove allegations (App. P. 42).

On July 3, 2000, Judge Young entered an order, granting Postal Services motions for partial summary judgment. Judge Young concluded that there were no other issues remaining for decision. Thus, the order constituted a final judgment. Judge Young dismissed Hogan's Motion in Limine and for Sanctions.

Hogan filed this appeal on July 31, 2000.

On August 17, 2000, Hogan filed a Petition for Reconsideration of the July 3, 2000 order and affidavits from witnesses (see DKT #122). On August 26, 2000, the court denied the Petition for

Reconsideration.

SUMMARY OF ARGUMENT

Hogan's outstanding performance evaluations, supported by testimony, affidavits and exhibits and based upon the objective criteria of several supervisors, were rejected by a judge as lacking in credibility. The judge declared that a single supervisor's, (who admits lying to the federal government in an earlier performance evaluation of Hogan), "perceptions"- unsupported by testimony, affidavits, documents or exhibits, was sufficient to eliminate any genuine issue of material fact and warrant summary judgment against Hogan.

Judge Young used several ways to deny Hogan due process and equal protection of the laws. His opinion ignores serious legal arguments raised and pretends that the questions were never raised. He restated Hogan's legal contentions in different language to avoid answering the questions and arguments Hogan raised. He answered entirely different arguments that Hogan never made. He personally attacked Hogan, while neither answering nor giving any hint as to possible errors in Hogan's legal argument. He concocted facts to justify his decision, using innuendo to discredit Hogan. He committed nearly every variety of injustice, whimsically and capriciously, and called it "an exercise of discretion."

REASONS FOR GRANTING THE WRIT

Before the civil rights laws were passed, most blacks faced blatant discrimination that was legally prescribed or permitted. After passage of civil rights legislation, many blacks felt optimistic about the future. Blacks began moving into many previously forbidden areas of society. However, civil rights progress came to a standstill in the 1980s. Many blacks believe the country and our government have moved backward in the quest for racial justice. Political agendas have been devastating to racial progress.

In the Congressional debates leading up to the passage of Title VII, women were added to the bill by forces opposing the bill, as an afterthought and with cynicism in an attempt to kill the effectiveness of Title VII. The irony is that, today, in the black community, the perception is that Title VII is for the protection of white women only. The law no longer applies to blacks-the protected class that Title VII was originally intended to protect. The perception in the black community, especially among black men, is that the law, Title VII, is not applied fairly. Why bother suing. Get over it. Move on with your life. Find other means to keep your family together and your sanity. These are sentiments evidencing a lack of hope in the law and the courts. A review of this case could help in eliminating this perception.

1. The trial judge's usurpation of the fact-finding function of the jury, is a violation of due process and equal protection of the law?

The lower court said:

> *". . . There is nothing racist about Hogan's Hispanic supervisor and his coworkers speaking to each other in the language with which each is most comfortable. In addition, nothing in Title VII compels a supervisor to be amiable with any particular employee even when that supervisor pals around with other employees. . . . Thus, Title VII permits people to have their differences; what it prohibits is abusive treatment generated from racial animosity. Ultimately, all Hogan can point to is a feeling he has that Molina doesn't speak to him because of this prohibited animosity. . . . not being spoken to by one's supervisor is, as matter of law, not severe and abusive treatment." Opinion, pages 18-19* (App. P. 18, L. 15).

Hogan never said that Supervisor Molina's speaking to Mexican workers in a different language was racism on its face, as inferred by Judge Young. Such a statement, by the lower court judge, is a misrepresentation of the facts presented to the court by Hogan, during his deposition, through answers to interrogatories, through exhibits, through the documents he was able to get from Postal Service through discovery and through the evidence presented in the form of sworn affidavits from several of Hogan supervisors and coworkers.

According to an affidavit, submitted by a more experienced supervisor, Al Hansen (a white male), Supervisor-trainee Molina had a bias against Hogan from the start. Hansen related that: *"During the first week Supervisor Molina stated to me that Hogan needs to be watched and that he (Hogan) would be trouble."* See Supervisor Al Hansen's Affidavit (App. P. 131, Par. 2.)

"When I first came to Phoenix, Arizona in 1993 and was assigned to the Rio Salado facility, Tour-three was predominantly supervised by Hispanic males. They had a conquistador attitude, which is I am the boss" (See Supervisor Al Hansen Affidavit, App. P. 132, Par. 6).

Supervisor Molina, on October 12, 1993, after only 12 days as a supervisor, gave Hogan's similarly situated coworker, Jesus Garcia (who is also of Mexican descent), a glowing recommendation for rehire. Garcia had failed the postal test. Hogan passed the postal test. Supervisor Molina did not give anyone else in the group, of 7 casual employees, a similar recommendation for rehire. Supervisor Molina's behavior showed a bias for Mexicans, like himself. He was trying to further Garcia's career without giving himself time to make a proper evaluation of Garcia's skills.

Before Molina took over supervision of the unit, Hogan's supervisors treated casual employees equally. For example, when there was a back-log of work in the MAZE, they sent all of the casual employees to work in the MAZE (App. P. 127, Par. 4).

Supervisor Molina discriminated in assigning the work among the casual employees. He always assigned Mexican workers to do the preferable jobs. He always assigned the 2 black workers, Hogan and Johnson, to the MAZE, to "sweeping and loading" and jobs no one else wanted to do." ["Sweeping and loading" is the rapid loading and unloading of large quantities of mail from containers. It is very demanding and hazardous work.]

After a while, it became apparent that, when Supervisor Molina would come to move employees to another area, it would be Hogan and Kyle Johnson. The Hispanic (Mexican) employees would always be the last to go and the first to come back to the section. I knew that as long as Percy and Kyle were there, I would never have to do the jobs that they had to do. (See Affidavit of Barbara Hansen (a white female employee), App. P. 134, Par. 5).

In late October 1993, Supervisor Molina falsely accused Hogan and the only other black employee, Kyle Johnson, of sabotaging the work, by telling the crew to slow down the work, to earn extra overtime (App. P. 137, 138).

Supervisor Molina did not subject Hogan's similarly situated White and Hispanic coworkers to serious allegations-without investigating the facts. Supervisor Molina's tirade showed a hostility toward black employees. From that day forward, Supervisor Molina goaded Hogan and the other black employee, Kyle Johnson, trying to intimidate or provoke them.

Jobs at the Postal Service were in great demand and there was a long waiting list of people seeking employment. Supervisor Molina manipulated the job applications, so that he could only hire Mexican workers. An example is that, for Christmas 1993, Supervisor Molina hired 16 to 20 "Christmas casuals." All were Mexican women. Also, Supervisor Molina replaced Thomas Coro with Mexican women.

Supervisor Molina was rude toward Hogan, even when assigning work. He was receptive and open toward Mexican workers. He would spend fifteen or twenty minutes chatting in Spanish with Mexican workers (App. P. 135, Par. 5). Supervisor Molina used the Spanish language to hide the advantages he gave to the Mexican workers, e.g. time off and work assignments. He also used the language barrier to divide the group, thus creating a hostile working environment for the non-Mexican workers.

> *In the two years that Simone Molina was my supervisor I never heard Simone say anything nice about black people. When he spoke of blacks it was always negative. Case in point, one day an older black women in our area named Joyce came upon a magazine in our area. I think it was TIME magazine and the cover story said "Oldest human skeleton found in Africa". Joyce started showing the magazine to everyone that passed by saying See!! I always knew that Adam and Eve were BLACK!!!!". When Simone saw what was going on he became visually upset. Instead of confronting Joyce he walked over to me. He asked me if I believe it was true. I told Simon I didn't know and that I really didn't care. It really wasn't an issue that I cared about. I noticed that Simon was shaking and upset. I suggested that he leave the area and calm down. He took my advice but as he turned to walk away I heard him say "those people make me sick".* (see Affidavit of Wayne Rowe, App. P. 128, Par. 4).

Judge Young simply disregarded the undisputed evidence presented by Hogan. He pretended that Hogan's entire "hostile environment" allegation evolved from "*a feeling he has that Molina doesn't speak to him because of his prohibited animosity. . .*" Thus, Judge Young completely eliminated the facts that should have been presented to the jury. Judge Young pretended that the evidence presented by Hogan did not exist. The opinion says:

> *[Hogan] ". . . must bring forth relevant evidence, by affidavit, deposition testimony, or other sources, which tends to show a genuine issue of material fact exists regarding the severity and pervasiveness of the alleged*

> *conduct. He marshals no such evidence. . . . the Court is left with Hogan's unsworn statement in his complaint that he was often assigned the menial tasks while Hispanic employees were rarely asked to do these tasks.* *See Am. Compl. ¶ 23. But even if this were evidence, as is required by Rule 56, the Court could not reasonably infer that the conduct complained of was both severe and pervasive. Hogan fails to specify how many times he was asked to perform these tasks or how "rarely" his Hispanic colleagues were asked to do these tasks. Thus, a ruling that the conduct was pervasive is impossible. . . . Having failed to provide evidence on this issue, summary judgment in favor of Henderson is in order on the hostile work environment claim. [FOOTNOTE OMITTED] Opinion, page 20-21* (App. P. 21, Par. 1).

The court usurped the jury's function, when it disregarded the evidence. Obviously, the character of racial discrimination varies in any given situation. It may involve outright persecution or it may involve avoidance behavior. Hogan presented evidence of an exploitative relationship which took more value from black workers. He presented evidence of many everyday acts of mistreatment of blacks. These acts were unpredictable and sporadic and unacceptable. Such actions were cumulative in their negative impact.

Hogan's unit was primarily Mexican. Though not officially segregated, Supervisor Molina was clearly hostile toward black workers and only wanted Mexicans working in the unit. This racism is against the basic principles of the United States. Of course, Supervisor Molina was careful not to act in a blatantly racist way. He knew what to say publicly. His bottled up prejudices exploded into the open with his blatantly false evaluation of Hogan's work.

The behavior was illegal, but the appropriate laws are not being enforced. The judge simply assumed that Postal Service is more insightful about racial change than blacks. This fiction again gave privileges and justified anti-black hostility and intentions, by citing what he presumed to be the good intentions or good character of the discriminators. The court arranged a much too convenient work environment that managed to ignore the racism and discrimination. A litigant should have a reasonable expectation that the judge will, at least, consider the evidence presented to the court.

So as not to alienate a huge section of the working population that Title VII is intended to protect, the Court's discretionary jurisdiction is warranted because this matter involves a question of exceptional importance where national uniformity is so badly needed. It must be clearly understood that judges are not free agents in rendering their decisions, regardless of the impression given by some. In Justice Frankfurter's words: *"We do not sit like kadi under a tree, dispensing justice according to considerations of individual expediency."* ***Terminiello v. Chicago***, 347 U.S. 1 (1949)

Ultimately, a nation's unity, strength, and well being rest on its citizens compliance with its laws. Obedience to laws rests primarily on the belief in the legitimacy of our laws and in the moral authority of our legal and political institutions.

2. The lower court decision created a dangerous precedent, by redefining "similarly situated" in a racial discrimination case.

During his deposition, Hogan testified that Supervisor Molina routinely gave Hogan's Mexican coworkers 2 days off every week. He always gave them the best days off. Sometimes, Supervisor Molina gave them more than 2 days off per week. On Hogan's days off, Supervisor Molina would call Hogan at home and require that he come to work. Supervisor Molina did not require Mexican employees to come to work on their scheduled days off. This testimony is undisputed in the record.

The lower court distorted Hogan's deposition testimony to mean that the only way the Mexican workers got time off was because they asked.

The lower court abused its discretion in manipulating the facts to conclude that Hogan was not "similarly situated" with other casual employees of Mexican descent. See Opinion, page 11 (App. P. 11-12 and App. P. 79-83). The other casual employees reported to the same supervisor. They were subjected to the same performance and discipline standards. They engaged in similar conduct. There was no differentiating or mitigating circumstances to distinguish their conduct or the appropriate discipline for it. See ***Mazzella v. RCA Global Communications***, 642 Fsupp 1531 (S.D. N.Y. 1986), affirmed 814 F2d 653 (2nd Cir. 1987)

The Mexican workers received preferential treatment and were not subjected to the threat of losing their job, if they asked for time off. Supervisor Molina often threatened Hogan, saying he could fire any casual employee for little or no reason. Supervisor Molina arbitrarily fired three casual employees. They were either black or non-Mexican. This evidence is also undisputed in the record.

The work slow down or strike by regular employees:

> *". . .had little effect on the casual employees as they didn't have bid jobs. Their start times and the number of hours worked during the week were at the complete discretion of our immediate supervisor Simone Molina. Casual employees were supposed to have two days off per week. But, in reality supervisors could work them as they saw fit. The casual's need and desires for time off (even if requested in advance) came in a distant second to the needs of our department and seemed not to matter. Because, there was no routine postal procedure or postal regulation that defined precisely what a supervisor could not do with a casual, the post office used the casuals to get the mail out against the productivity slow down (strike*) App. P. 126, Par. 3).
>
> *"It was about this time I witnessed the termination of*

> *Thomas Corso (Coro). Thomas was terminated for not working overtime (2 hours after an 8-hour day). After standing for 8 hours, Thomas's ankles were swollen and he went home. When he returned to work the following day, Supervisor Molina took him off the work room floor into the office and terminated him. He came back out on the floor to collect his belongings; he was crying. Supervisor Molina was defensive and would not allow Thomas to talk with anyone. We spoke a few words and then he left."* See Affidavit of Barbara Hansen (App. P. 135, Par. 1).

A review of this case is necessary to re-establish and maintain the integrity of the decision in ***Burgess v. State of Washington Dept. of Corrections***, No. 98-35417, 1999 WL 974182 (9th Cir. 1999). ***Burgess v. State of Washington Dept. of Corrections***, supra, made a distinction between regular or permanent employees and temporary or casual employees. Judge Young concluded that a request for time off renders similarly situated coworkers dissimilar. In reaching this conclusion, the lower court gave new meaning to ***Burgess v. State of Washington Dept. of Corrections,*** supra (see explanation at App. C, p. 8-12). A review of the instant case is imperative to prevent other courts from stretching the meaning of "similarly situated" under ***Burgess v. State of Washington Dept. of Corrections***, supra to avoid making a comparison of similarly situated employees.

3. The lower court completely eviscerated the burdens of proof, as set forth in *McDonnell-Douglas v. Green*, 411 U. S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981):

Judge Young wrote:

> *. . . even though Hogan satisfies his preliminary responsibility of proving a prima facie case, Henderson satisfactorily rebuts the presumption and Hogan fails to show that racial discrimination motivated the decision*

to deny rehiring him. . . . See Cordova, 124 F.3d at 1149 (citing Wallis, 26 F.3d at 889); see also Burdine, 450 U.S. at 254. [FOOTNOTE OMITTED] . . . (App. P. 27, Par. 2) . *See Molina Aff. ¶ 10, Ex. I. Poor employee performance is the quintessential legitimate, nondiscriminatory reason explaining an adverse employment action. Having cited it as the motivating reason for the decision and supported it with a contemporaneous writing and deposition testimony, Henderson has borne his burden of going forward.' Opinion, pages 27-28*

"Here, Henderson submits evidence that Hogan was denied the position because his overall performance had been "marginal" and that he required constant supervision due to his wandering away from his work area. See Molina Aff. ¶ 10, Ex. I. . . .." Opinion, pages 27-28 (App. P. 28, Par. 1).

". . . As a result, Hogan can withstand Henderson's summary judgment attack if he can show, by specific and substantial evidence, that Henderson's proffered motives were not the actual motives." Opinion (App. P. 30, L. 17).

Contrary to the conclusion reached by Judge Young, Postal Service did not produce any admissible evidence, concerning Hogan's work performance (in 6-years of litigation), to support Supervisor Molina's statements. Postal Service did not submit deposition testimony or anything else recognized by law as evidence, supporting its contentions. Postal Service's "evidence" consists of unbelievable, last-minute affidavits and assertions which only raise questions about the credibility of Postal Service's witnesses.

Supervisor Molina's affidavit informs the court that Supervisor Molina lied to the federal government, his employer, Postal Service, when he positively recommended Hogan for rehire, in January 1994 (see DKT #93, Vol. II, P. J-14). That is how he justifies the negative evaluation he gave Hogan, after Hogan sued him. The question for the court is which of Molina's lies is more believable. Is it more likely that he made a more honest evaluation when he was not faced with the possibility of liability? Or, is it more likely that he lied after being sued, to protect his self-interests? Since Supervisor Molina's actions remain unexplained, it is more likely than not that such actions were based on a discriminatory criteria illegal under the act. ***Furnco Construction Co. v. Waters***, 438 U.S. 567 (1978); ***Texas Department of Community Affairs v. Burdine***, supra at 1094

Supervisor Molina also states that Hogan ". . . also wandered from his position frequently." However, Molina does not present any fact to support the statement, such as a date or time or place where Hogan "wandered from his position" (App. P. 121, 122). Postal Service's articulation of legal conclusions, rather than setting forth facts upon which such conclusions are based, does not meet the requirements of Rule 56(e). ***Wire Mesh Products, Inc. vs. Wire Belting Association***, 520 F.Supp. 1004 (E.D. Pa. 1981)" Opinion, page 18.

4. The outstanding performance evaluations of several supervisors and coworkers, supported by testimony, affidavits and exhibits were rejected, while a single supervisor's, (who admits lying to the federal government, in an earlier performance evaluation of Hogan), "perceptions"-were accepted.

The few clock rings Postal Service produced are irrefutable evidence that Hogan was, by far, the best employee in the unit. The clock rings, showing the overtime hours worked by the entire unit of 23 employees, proves that Supervisor Molina's criticism of Hogan's work performance is a pretext to unlawful racial discrimination. Such imbalance is a telltale sign of purposeful discrimination. See ***Teamsters v. United States***, 431 U.S. 340 (1977)

Those clock rings show that Hogan worked more overtime hours than any "regular" in the unit and, at least, 400 hours more overtime than any other "casual employee" of Mexican descent in the unit, during the period in question, beginning June 1993 and ending June 1994. Hogan worked 321 days of 10 to 12 hour shifts. Hogan was off 9 days out of 330 working days (see DKT #93, Vol. II, P. N-16, L. 20, 21). Hogan worked 3,120 hours, during the year (1041 overtime and 2079 regular hours) (see "Brief for Appellant", ER. Vol. III, P. 1633 or DKT #92 Affid). "*Simone (Molina) was all too aware that Percy (Hogan) was an outstanding worker. That is why Simone (Molina) allowed Percy (Hogan) to work such long hours. It would have been very easy for (Supervisor) Simone (Molina) to scale back Percy's (Hogan) work hours if he thought he (Hogan) was unproductive.*" See Affidavit of Wayne Rowe (App. P. 129).

Postal Service's supervisors gave Hogan 10 highly favorable recommendations for rehire in one year (see DKT #93, Vol. II, P. N-13, N14). Three of those recommendations were received within days of Hogan's casual expiration date. One came from Supervisor Molina. Thirteen days later, Supervisor Molina gave Hogan a bad evaluation.

What facts did Supervisor Molina use to reach the conclusion that Hogan was a marginal employee? He used subjective criteria which has no basis in fact. Postal Service cannot honestly argue that Hogan was a marginal employee, while giving less productive Mexican workers positive evaluations.

Supervisor Molina's unsupported conclusions are disputed by four of Hogan's former supervisors and coworkers who filed affidavits. Others refused to come forward, out of fear of retaliation. Those who refused had been "interviewed" by government lawyers about this case and, like Barbara Hansen, had concerns about retaliation (App. P. 136, Par. 3).

Wayne T. Rowe, a 38 year old white male, who has worked as a regular, full-time employee for the US Postal Service since 1985, described working with Hogan, under Supervisor Molina.

"Moral was very low among the regular career employees. There was talk of abolishing our bid jobs and changing our start time to 3:30 p.m. . . . As a result, I believe overall productivity in our area was down at the time. . . . (App. P. 126, Par. 2).

Then there was Hogan a black man who was also a casual employee. It wouldn't be fair to describe him as an above average worker because he was really an exceptional worker. I am not exaggerating when I say he did twice as much work as the average worker. This is not just a subjective opinion. Each piece of equipment that held mail to be worked had a weight tag on it and after you were finished working that mail you would put the tag on your case. Nobody ever had more weight tags on their case than Hogan. It is unnerving to watch a guy work twice as hard as you and make less than half the hourly wage as you. Not only did Hogan work hard but long hours. At one point I believe he worked seven days a week for about a month (App. P. 127, Par. 1).

"When I heard that Hogan was not to be rehired in some capacity, I was shocked." "Hogan was a self-motivated employee, not needing direct supervision". (See affidavit of the most experienced supervisor, Al Hansen, App. P. 132, Par. 3).

"Mr. Hogan can work without direct supervision because he takes the initiative to get the job done".

Supervisor Al Hansen, letter of recommendation for rehire, dated May 27, 1994 (App. P. 130).

"Hogan never lost his temper and never challenged any orders" (See Supervisor Al Hansen's affidavit, App. P. 132, Par. 3).

"Hogan was always at his work station. He always seemed to be there. The other casuals followed Hogan's work habits which were a constant high volume output wherever he worked. Excellent attendance. Got along well (with) his peers and it appeared he got along well with all his supervisors." Supervisor Al Hansen (App. P. 131, Par. 4, 5).

"Do I believe that Hogan was discriminated against? Yes, I do!" Wayne Rowe (App. P. 128, Par. 3).

"Do I believe that Supervisor Molina is prejudicial against black people in general and Hogan in particular? Yes, I do!!" Wayne Rowe (App. P. 128, Par. 3).

"It is hard for me to adequately describe how outrageous it is for (Supervisor) Simone (Molina) to say that Percy (Hogan) was a marginal employee who doesn't deserve a job with the US Postal Service when he (Hogan) was literally the best employee in our area." Affidavit of Wayne T. Rowe (App. P. 129, Par. 3).

"I strongly feel that he (Hogan) is a victim of racial discrimination." Affidavit of Barbara Hansen (App. P. 136, Par. 2).

"I was disturbed and upset, as well as the rest of (the) section, when we learned what Supervisor Molina had written and ultimately done to Percy (Hogan). We all felt he (Hogan) had been given a bad rap, and that Percy (Hogan) deserved better. We felt that Percy (Hogan) was being singled out. We all agreed that Percy (Hogan) would have made a good employee of the USPS." Affidavit of Barbara Hansen (App. P. 135, Par. 6).

In late October 1993, Supervisor Molina falsely accused Hogan and the only other black employee, Kyle Johnson, of sabotaging the work of the unit, by telling the crew to slow down the work, to earn extra overtime (App. P. 137).

Supervisor Molina's original affidavit failed to mention the October incident as a factor in the performance evaluation he gave Hogan. The record indicates that on January 11, 1994, 3-months after the October 1993 incident, Supervisor Molina gave Hogan a written favorable recommendation for rehire. After Hogan sued Supervisor Molina, Supervisor Molina said that his June 1994 negative performance evaluation of Hogan was based on the October 1993 incident. Supervisor Molina never explained how this incident, which occurred before his favorable recommendation in January 1994, was the basis for the unfavorable recommendation 6-months later.

Molina attempted to get his pal and colleague, Luz Gonzalez, to assist him in putting a different spin on the October incident. Gonzalez, however, refused to sign an affidavit to that effect. This is the same Gonzalez who telephoned Hogan at home and threatened to get a female employee to falsify a sexual misconduct complaint against Hogan, if Hogan did not drop his EEO complaint against Supervisor Molina.

In the instant case, the record clearly shows witnesses establishing the fact that Supervisor Molina cannot be believed. Affidavits, in the record, contradict and challenge Supervisor Molina's every utterance (App. P. 92-93). Even Supervisor Molina admitted that he lied to the federal government. Under pressure, on September 8, 1994, Supervisor Molina withdrew the undeserved evaluation and replaced it with a positive recommendation for rehire (App. P. 122). A reasonable person would infer that Supervisor Molina's motives were nefarious. Yet, the lower court, sanction by the court of appeals, continues to give undue credence and to rely upon Supervisor Molina, the only witness for the defense. In the 7 years since Hogan sued, Postal Service has not produced one shred of evidence in support of Supervisor Molina's negative evaluation of Hogan's work. The lower court has departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory powers.

5. The lower court violated Hogan's due process and equal protection rights, by ignoring inferences provided by law.

Further, the court ignored the fact that Postal Service denied Hogan basic evidence which Postal Service is required, by law, to maintain and produce (App. P. 42-68). Postal Service withheld names, addresses and telephone numbers of Postal Service's regular employees. Postal Service effectively distorted and prejudiced Hogan's lawsuit. Postal Service made the task of finding witnesses and documents nearly impossible. " After destroying or concealing this evidence, Postal Service argued conclusions that those records and witnesses would contradict.

Essential, to a reasonable investigation of the facts, are the identities and work records of Hogan's supervisors and coworkers. Those records are not only pertinent to Hogan's allegations that Postal Service engaged in racial discrimination. They are equally pertinent to Postal Service's defense that it did not discriminate against Hogan. Postal Service cannot honestly assert a defense, without conducting a reasonable factual investigation to determine the truth of its defense.

Postal Service's failure to preserve material evidence is a "willful failure," sufficient to support default judgment as discovery sanction. It is any intentional failure, and no wrongful intent need be shown. ***Kiely v. Shores Group, Inc.***, 160 FRD 159 (D. Kan. 1995)

Postal Service continued its obdurate behavior, by not responding to Hogan's discovery for more than 100 days. Postal Service mislead the court and disregarded the court's orders. Then, Postal Service's responses were either evasive, incomplete or non responsive. Postal Service's attorney ridiculed Hogan for not having the information.

While denying the existence of records after 2-years, Postal Services did provide four-year old records in its response to Interrogatory #8. Obviously, it has records that it deliberately withheld from Hogan.

Attorney Mayfield admitted, in Postal Service's "***Motion for Privacy Act Protective Order***," filed on April 1, 1998, that *"the Postal Services have last known addresses of present and former U.S. Postal Service employees."* To date, over four-years later, Postal Service still has not provided any "last known address" to Hogan. This concealment of evidence shows a conscious and reckless disregard for discovery obligations. See ***Shaffer v. EWP Group, Inc.***, 169 FRD 19 (1996) (App. P. 64, Par. 5, 6).

The rules are not different for U.S. Attorneys. Government lawyers can be sanctioned personally for failure to comply with discovery orders. ***In re Williams***. Bankruptcy, D.R.I. 188 BR 721, affirmed in part, vacated in part 215 BR 289 (1995).

Postal Service's failure to preserve material evidence was either the result of gross negligence or was intended to obstruct justice. One can only infer from its conduct that it destroyed the records to conceal the evidence of racial discrimination or that Postal Service raised its defense with a reckless disregard for the truth. Obviously, Postal Service never investigated to determine whether it discriminated against plaintiff. If the Postal Service cannot determine who plaintiff's coworkers were, how can the Postal Service truthfully deny discriminating against plaintiff? There is an adverse inference that such information is harmful to Postal Service. ***Weeks v. ARA Services***, 869 F.Supp. 194 (S.D.N.Y. 1994); ***Murphy v. Williams***, 145 FRD 76 (ED Mich. 1992); ***Melendez v. Illinois Bell Telephone Co.***, 79 FRD 2d 661, rehearing denied (7th Cir. 1996). No lesser sanction would suffice to remedy the prejudice to plaintiff. ***General Environmental Science Corp. v. Horsfall***, 141 FRD 443, vacated 25 F3d 1048, 513 US 947 on subsequent appeal 53 F3rd 331 (1992)

Furthermore, Hogan filed three motions to strike Postal Service's motions for failure to comply with the court's scheduling order, setting a deadline of January 31, 1998 for motions pursuant to ***Federal Rule of Civil Procedure 12(b)*** (App. P. 38, Par. 1). In accepting those time-barred motions filed by Postal Service, the lower court dismantled and prejudiced Hogan's case, defying all notions of fairness. The court let Postal Service proceed, without regard for the agreed upon timetable. The effectiveness of the scheduling order was destroyed. ***Ely vs. Reading Co.***, 424 F2d 758 (3rd Cir 1970).

Rule 16(b) of the Federal Rules of Civil Procedure specifically provides that the party seeking relief, from the

Scheduling Order, must show that the deadlines cannot be met, despite the diligence of the party needing the extension of time. ***Daitz Flying Corp. vs. United States***, 4 FRD 372 (1945). Rule 16 has taken these matters out of the discretion of the Court and compelled more forceful management of the Court's dockets. The law does not place upon Hogan the burden of showing that Postal Services did not "prejudice" him in filing untimely motions, violating the court's scheduling order.

The court must enforce the terms of the scheduling order, if it is to serve its intended purpose of pretrial management designed to secure the just, speedy, and inexpensive determination of the action. ***Barwick vs. Celotex Corp.***, 735 F2d 946 (4th Cir 1984).

6. The lower court judge created a factual dispute, and then held that the plaintiff did not met his burden of disproving the concocted factual dispute.

To apply for the VRA program, an applicant had to be a Veteran; have worked satisfactorily in a casual or TE appointment for at least 60 days; be currently on the rolls; meet applicable qualification requirements including examination, background/suitability check for employment and criminal history, physical examination; have a satisfactory discharge from the military; submit a copy of test scores or a completed yellow test card; and submit a certified 5-year driving abstract (App. P. 140-143).

Hogan was the only military veteran and, therefore, the only casual worker eligible to apply for the VRA position (see DKT #93, Vol. II, P. N-17, chart). It is undisputed that, on or about May 14, 1994, all of Hogan's supervisors encouraged Hogan to apply for a position through the VRA program. Supervisor Molina drove 4 miles from the Rio Salado facility to get an application form for Hogan. He drove back a second time to get forms needed as attachments or addendums to the application (App. P. 92). Supervisor Molina advised and assisted Hogan in preparing the VRA application. He checked Hogan's driving record, to make sure there would be no problem.

Supervisor Molina directed Hogan to submit Supervisor Molina's positive recommendation, dated January 11, 1994, with his VRA application. When all of the information was collected, Supervisor Molina ordered the time-keeper, Andre Bolanger, to type Hogan's application so that it would be more professional. Supervisor Molina reviewed the VRA application, making sure that it had been prepared properly, before he sent it to Janice Boulden, VRA Coordinator in Postal Service's Personnel Department. See Deposition, Volume IV, page 25, line 8 to page 29, line 15 and page 85, line 22 to page 86, line 16.

After being sued, Supervisor Molina denied any responsibility for the failure of Postal Service to consider Hogan's application for the VRA program. In direct response to Supervisor Molina's affidavit, Postal Service's witness, Janice Boulden filed an affidavit, which shows that Supervisor Molina is a liar (App. P. 125). Boulden's affidavit says that all supervisors, including Molina, were told specifically not to send any applications for employees the supervisors would not recommend for rehire. Janice Boulder said that the supervisors decided whether or not an individual would be converted to career status under the VRA provisions. The Personnel Department had nothing to say in the matter (see EEO Affidavit of Janice Boulder, App. P. 94-97).

Why would Supervisor Molina send Hogan's VRA application to Janice Boulder, if he did not recommend Hogan for rehire? Is this not a question for the jury? Supervisor Molina procured the VRA application for Hogan just weeks before he wrote the negative evaluation. Supervisor Molina encouraged Hogan to apply for the VRA position. Hogan had complete support from all of his supervisors, as shown by the letters of recommendation for rehire from those supervisors. Those letters of support are dated during the week ending May 27, 1994-the deadline for VRA applications (see DKT #93, Vol. II, P. M-11, M-12).

"It is my understanding that Hogan applied for a career

position at the Post Office and was denied a job because our immediate Supervisor Simone Molina described Percy (Hogan) as a marginal employee. Nothing could be further from the truth" (see Affidavit of Wayne Rowe, App. P. 128, Par. 2).

The issue is straight-forward: whether Postal Service's failure to review Hogan's application for the VRA program, because of a concocted, negative performance evaluation from Supervisor Molina, was a pretext for unlawful employment discrimination on account of Hogan's race.

The lower court judge, essentially, mocked the issue. First, the judge belittled Hogan for saying that he was the only person in the unit qualified to apply for the position. Though Hogan's statements were based on the objective criteria posted by Postal Service, the judge described it as Hogan's subjective criteria, using such aspersion as "fails to provide any objective evidence to suggest . . . that his coworkers were inferior to him" (App. P. 25, L.13). None of the other casual employees were military veterans.

Next, the lower court judge wrote about whether Hogan could do the job, if his application had been accepted. This discussion, by the judge, is based solely upon "disputed facts" that the judge created to avoid the real issue of whether the failure to even consider Hogan's application violated Title VII (App. P. 25).

Next, the lower court judge diminished the favorable reviews and recommendations from Hogan's supervisors, as *"unreasonable for the Court to infer that merely because some supervisors contended that Hogan performed one job for the Postal Service well he necessarily would be qualified to perform any other Postal Service position. Hogan has not proved that he was minimally qualified for the position of city letter carrier"* (App. P. 26, Par. 2, L. 17). In fact, the only reasonable inference for the court to draw is that Hogan was qualified to apply for the position, based on the objective criteria Postal Service advertised as prerequisites for submitting an application.

The court's search for rationalizations for the discriminatory treatment Hogan received belies the court's role as a neutral arbitrator and its duty to follow the Rule of Law, in deciding a motion for summary judgment.

7. An "agent" of an "employer" is subject to individual liability under Title VII.

The lower court, without any explanation, dismissed Simon M. Molina as a defendant in this lawsuit (App. P. 38-39). There is general agreement among the circuits, which have addressed the issue, that an "agent" of an "employer" is subject to individual liability under Title VII. ***42 USC 2000(e)(b)***. Supervisor Molina had authority to hire, to fire and to affect the terms of plaintiff's employment. See ***Sauers vs Salt Lake County***, 1 F3d 1122, 1125 (10th Cir. 1993); ***Harvey vs. Blake***, 913 F2d 226, 227 (5th Cir. 1990); See ***Paroline v. Unisys Corp.***, 879 F2d 100, 104 (4th Cir 1989). The court must look for guidance to common law agency principles. See ***Meritor Savings Bank, FSB v. Vinson***, 477 US 57, 73, 106 SCt 2399, 2408, 91 LEd2d 49 (1986) (App. P. 76 – 78).

8. It is unrealistic for the lower court to pretend that the exact same conduct and circumstances would exist in situations involving sexual discrimination and racial discrimination.

In ***a Chicago Tribune*** and ***Pittsburgh Post Gazette*** article, by Jan Crawford Greenburg, titled *Justices Take Up Job Bias Damages*, before the Court decided ***Kolstad v. American Dental Association*** (App. P. 76), Chief Justice William Rehnquist is quoted as saying about Title VII, "*This statute is simply confusing." "No one can pretend that it is a clear guideline as to where a court is to go"* (see "Brief for Appellant", ER. Vol. III, P. 1327, Exhibit B).

It is clear that Judge Silver did not know how to relate Ninth

Circuit law and Supreme Court law to the issue of racial discrimination. Judge Silver wrote that *"Plaintiff does not allege that Molina acted violently toward Plaintiff, threatened him with violence through either words or conduct such as stalking or engaged in consistent inappropriate physical contact with Plaintiff along with trapping him in a room. Nor does Plaintiff allege conduct of a different type but equally egregious in nature"* (App. P. 39).

It is important for the Court to clarify exactly what "conduct of a different type" means in a job discrimination case based upon racial discrimination. The court has only clarified what conduct is inappropriate against women. A black man will rarely, if ever, be confronted with the obviously strong sexual connotations encompassed in Judge Silver's determination. Racial discrimination is more subtle and covert. It is devastating, like sexual discrimination. Judge Silver made a valiant attempt, using existing law-struggling to include even a case such as this. The Court's review of this case is needed to clarify what "conduct of a different type" means in a racial discrimination lawsuit.

This petition requests a review not only because of erroneous factual findings, conflicts and distortions by the lower court and misapplications of law, it is the totality of this ruling that conflicts with relevant decisions of this court. For the reasons set forth above, Percy Hogan, Jr. respectfully requests that the Court grant a petition for a Writ of Certiorari to the 9th Circuit Court of Appeals.

Percy Hogan Jr. 5/17/02

Percy Hogan

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Filed July 3, 2000
Clerk US District Court Arizona

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

PERCY J. HOGAN,)
)
Plaintiff,)
)
v.)
)
WILLIAM J. HENDERSON, in his official)
capacity as Postmaster General)
of the United States; [1])
SIMON M. MOLINA; THE ATTORNEY)
GENERAL OF THE UNITED STATES;)
THE UNITED STATES ATTORNEY FOR)
THE DISTRICT OF ARIZONA; THE)
UNITED STATES POST OFFICE,)
Defendants.)

CIVIL ACTION NO. 96-1189-PH X-ROS

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[1] Hogan initially brought suit against former Postmaster General Marvin T. Runyon. Pursuant to Fed. R. Civ. P. 25(d)(1), Runyon's successor, William J. Henderson, has been substituted to represent the Postal Service in his official capacity. See Jordan v. Henderson, No. C-97-3810-VRW, 1998 WL 427415, at *1 (N.D. Cal. 1998) (substituting Henderson following Runyon's resignation).

MEMORANDUM AND ORDER

YOUNG, D.J.[2] June 20, 2000

Acting *pro se*, the plaintiff Percy Hogan ("Hogan"), a former employee of the United States Postal Service, brings this suit against various defendants alleging racial discrimination and seeking back pay, monetary damages, and declaratory and injunctive relief due to alleged violations of Title VII, 42 U.S.C. § 1983, and a pendant state law claim for infliction of emotional distress. In light of prior rulings,[3] what now remains of his second amended complaint is a Title VII action pursuant to 42 U.S.C. § 2000e-16 against Postmaster General William J. Henderson ("Henderson"). Now, firing a second barrage of motions, Henderson seeks to halt Hogan's advance before the Court actually examines the evidence in the case.

II. Factual Background

For the purposes of these motions the alleged facts are taken primarily from Hogan's complaint. Hogan is an African-American who worked at a postal facility in Rio Salado, Arizona. See Second Am. Compl. ¶¶ 2, 6. Hogan worked intermittently from November 30, 1992 through June 29, 1994 as a "casual" employee. See id. ¶ 6. A casual employee cannot be employed in lieu of full or part time employees, but is hired as a supplemental worker for as long as two 90-day terms of employment per year. See id. Of the approximately twenty employees on Hogan's shift, only two were African-American. See id. ¶ 7. During the course of his employment at Rio Salado, Hogan receive highly favorable recommendations from his supervisors and was rehired five separate times. See id. ¶ 8. Hogan alleges that he never missed a day of work, was always respectful of his supervisor and coworkers, and consistently performed his duties in a "more than satisfactory manner." Second Am. Compl. ¶ 9. Hogan claims that the supervisors would often call him -- and not the Hispanic employees -- at home on his days off and request that he report to the facility in order to work overtime. See Id. ¶ 10. Molina became Hogan's direct supervisor in September or October of 1993 and, according to Hogan, racial discrimination began. See id. 12, 13. In late October 1993, Molina called Hogan into his office and accused Hogan of conspiring to slow down the work flow so that extra overtime hours could be earned. See id. ¶ 14. Hogan alleges that Molina made this false accusation on the basis of Hogan's race and that it caused Hogan much anxiety and distress. See id. ¶ 17. Hogan alleges that another African-American employee was accused of the same conduct that day, while similarly situated white and Hispanic employees were not subjected to this harassment. See Second Am. Compl. ¶ 18. Under Molina's supervision, Hispanic workers were routinely given time off, while Hogan and other non-Hispanic workers were not provided these benefits. See id. ¶ 21. Furthermore, Hogan was always the first to be assigned to do the menial tasks while Hispanic employees were rarely asked to do these tasks. See id. ¶

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[2] Of the District of Massachusetts, sitting by designation.

[3] In an Order filed on February 11, 1999, Judge Rosyln O. Silver granted the defendants' motion to dismiss [docket no. 44-1], and dismissed the following defendants: Simon M. Molina, the Attorney General for the United States, the United States Attorney for the District of Arizona, and the United States Post Office. Judge Silver also granted an additional motion to dismiss [docket no. 44-2] submitted on behalf of the defendants which disposed of the 42 U.S.C. § 1983 claim, the state tort claim, as well as the claim for punitive damages.

23. In addition, Molina rarely spoke to Hogan, while Molina frequently chatted with the Hispanic workers in Spanish. See id. ¶ 25.

On May 27, 1994, when the Veterans Readjustment Appointment ("VRA") program posting for career city letter carriers was released, Hogan alleges that he was the best qualified candidate to become a regular postal employee. See Second Am. Compl. ¶ 27. Unlike his coworkers, Hogan passed the postal exam, was a four-year (1964 -1968) veteran of the Air Force, and met all the qualifications specified for the position. See id. Molina directed Hogan to apply for the position and submit Molina's favorable recommendation, which was dated January 11, 1994. See id. ¶ 28. In May 1994, Hogan applied for the permanent city letter carrier position. See id. ¶ 29. On June 29, 1994, Hogan's temporary casual employment term expired and his term was not renewed. See id. ¶ 30. On July 22, 1994, Hogan inadvertently learned that Molina had made a subsequent negative recommendation, which described Hogan's performance as marginal and explained that Hogan frequently left his work station without authorization and required constant supervision. See Second Am. Compl. ¶¶ 31, 32. Hogan alleges that his requests to be renewed as a casual employee or to be hired as a career city letter carrier were rejected because of Molina's intentionally false recommendation. See id. ¶¶ 30, 31, 32. Hogan specifically alleges that the reasons provided by Molina for the failure to rehire Hogan "were a pretext to unlawful racial discrimination." Id. ¶ 34.

III. Standard of Review

Pursuant to Fed. R. Civ. P. 56(c), summary judgment ought be granted where there is no genuine issue of material fact and the movant is entitled to judgment as matter of law. The moving party has the burden of establishing both the lack of any genuine issue of material fact and its entitlement to judgment, and the inferences drawn from the underlying facts must be taken in the light most favorable to the nonmoving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). The moving party may discharge its burden by showing that there is an absence of evidence to support the nonmoving party's case. See Celotex Corp., 477 U.S. at 322-23. The party opposing a motion for summary judgment may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial, Anderson, 477 U.S. at 248, 250, or significant probative evidence tending to support his claim or defense. See Richardson v. Nelisen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The mere existence of any factual dispute will not defeat a summary judgment motion, for the requirement is that there be a genuine dispute about a material fact. See Anderson, 477 U.S. at 247-48. A dispute is genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See id. at 248. A fact is "material" if it is critical to, or might affect, the outcome of the suit under the governing law. See id. These general principles of summary judgment practice apply with equal force in the employment discrimination context, but since intent is often disputed in such cases, courts treat summary judgment motions in employment discrimination cases with some caution. See Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991). Nonetheless, summary judgment may be appropriate for discrimination claims when the plaintiff does nothing more than present conclusory allegations. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) (summary judgment appropriate, after showing of a "bare prima facie case," where evidence to refute defendant's legitimate explanation was "totally lacking ").

IV. Discussion

A. The Motion in Limine

Henderson moves to preclude Hogan from attempting to introduce testimony, documents, exhibits, or other evidence which address or prove allegations or issues beyond the scope of his administrative complaint. Henderson claims that after Hogan's administrative complaint was accepted for investigation, a letter was sent to him which limited the scope of the claims that would be investigated to the allegation that he was denied a permanent letter carrier position on account of his race. See Def.'s Mem. in Support of Mot. In Limine at 2, Ex. A. This letter also advised Hogan that if he had any disagreement with the defined issues, he should communicate those objections in writing to the Equal Employment Opportunity ("EEO") office.[4] See id. Because Hogan never responded, Henderson argues that the only claim for which Hogan has exhausted his administrative remedies is that he was "[d]enied employment as a career City Letter Carrier." Id. Hogan responds that "[t]he truth is that plaintiff's administrative complaint contains every allegation that has been included in this lawsuit," Pl.'s Reply to Defs.' Mot. In Limine at 1, and argues that because his duty is merely to complain to the administrative agency and that he has discharged this duty he has satisfied the exhaustion requirement. The issue however, it is far more complicated than either of the parties suggest.

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[4] The February 2, 1995 letter specifically stated: The scope of the investigation will include the following issue(s) only:

> **Specific Issue(s)**: Denied employment as a career City Letter Carrier.
>
> **Date(s) of Incident:** July 22, 1994.
>
> **Basis(es) of Discrimination:** Race (Black - Non Hispanic).

If you do not agree with the defined issue (s) , you must provide sufficient reasons, in writing, to substantiate your objections within seven (7) calendar days of receipt of this letter.

A Title VII claimant must exhaust administrative remedies before seeking judicial relief from discriminatory action See Sloan v. West, 140 F.3d 1255, 1259 (9th Cir. 1998). The Ninth Circuit has elucidated the policies at stake in the following manner:

> The scope of the exhaustion requirement is best understood in the context of the Title VII policies which it is intended to further. Because laypersons often initiate employment discrimination complaints and because the policies of Title VII are promoted by encouraging administrative conciliation of employment discrimination complaints, Title VII's procedural requirements are "neither interpreted too technically nor applied too mechanically." Richerson v. Jones, 572.

See Def.'s Mot. in Limine at Ex. A. A February 8, 1995 letter from the EEO investigator assigned to the EEO complaint indicates that the scope of the investigation would include the same issue specified in the February 2, 1995 letter. See Def.'s Mot. In Limine at Ex. B. F.2d 89, 95-96 (3d Cir. 1978) . . . . The absence of a perfect "fit" between the administrative charge and the judicial complaint is therefore not fatal to judicial review if the policies of promoting conciliation and avoiding bypass of the administrative process have been served.

Ong v. Cleland, 642 F.2d 316, 318-19 (9th Cir. 1981) (citations omitted).

The general purpose of the exhaustion requirement is, therefore, to provide the agency an opportunity to handle the matter by settlement or, if necessary, by righting the discriminatory conduct prior to judicial involvement. Thus, in the usual circumstance, the crux of the inquiry is whether the administrative complaint sufficiently notified the agency of allegedly discriminatory actions so that the agency intelligently could address the matter. In this context, the administrative complaint "must be construed 'with the utmost liberality.' " Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997) (citing EEOC v. Farmer Bros. Co., 31 F.3d 891, 899 [9th Cir. 1994]). Furthermore, "[t]he substance of administrative charge, rather than its label, is the concern of Title VII." Ong, 642 F.2d at 319 (citations omitted).

Although cited by neither party, the Yamaguchi case is particularly instructive here. In Yamaguchi, the district court had held that the plaintiff's administrative complaint did not include allegations of sex discrimination. See Yamaguchi, 109 F.3d at 1480. The Ninth Circuit first explained that, although "less than clear and complete," her complaint described conduct which constituted sexual harassment. Id. The Air Force also pressed the point now asserted by Henderson:

> In its investigation and decision, the EEOC only addressed Yamaguchi's sexual harassment allegations against Clark, not her claim of sex discrimination. The EEOC's failure to address the sex discrimination claim, however, is irrelevant to whether Yamaguchi exhausted her administrative remedies on this issue. The district court has subject matter jurisdiction over allegations of discrimination that either "fell within the scope of the EEOC's actual investigation or an EEOC

> investigation which can reasonably be expected to grow out of the charge of discrimination." Farmer Bros., 31 F.3d at 899 (internal quotations omitted). An investigation of Yamaguchi's sex discrimination charge could "reasonably [have been] expected to grow out of" her EEOC charge. The fact that no such investigation took place does not preclude federal court jurisdiction over this claim. Id.

Here, there is no dispute but that Hogan's administrative complaint contains every allegation he now presses in this matter. See Pl.'s Reply to Defs.' Mot. In Limine Exs. A-1, A. Realizing this, Henderson tactfully directs his attack toward the scope of the EEO investigation. Henderson argues that because the investigator only examined the claim relating to Hogan's denial of the permanent city letter carrier position, Hogan cannot now press the alternative claims which were nonetheless contained in the initial administrative complaint and which are alleged in his second amended complaint to this Court. Yamaguchi, however, makes clear that "[t]he fact that no such investigation took place does not preclude federal court jurisdiction over this claim." Yamaguchi, 109 F.3d at 1480. Instead, what governs the analysis is whether the allegations fall within the scope of the actual EEO investigation or an EEO investigation which could reasonably be expected to grow out of the charge of discrimination. See id. Although Henderson does not argue the point in precisely this manner, his reliance on Hogan's failure to amend the stated scope of the investigation goes to whether an investigation "could reasonably be expected to grow out of the charge of discrimination." Id.

The Ninth Circuit has cautioned that because uncounselled laypersons often initiate employment discrimination complaints, Title VII's procedural requirements should be "neither interpreted too technically nor applied too mechanically." Ong, 642 F.2d at 318-19 (quoting Richerson, 572 F.2d at 95-96). Viewed in light of this cautionary reminder, even in the face of the February 2, 1995 letter, Hogan could reasonably expect the EEO to investigate allegations in addition to his denial of the career city letter carrier position. A layperson would reasonably expect that the agency charged with the responsibility of investigating allegations of discriminatory employment practices would look into all of the allegations substantiated in the affidavit. The February 2 letter does not render such expectation unreasonable. The letter specified the adverse employment action which was the paramount step in an ascending series of allegedly discriminatory acts. Thus, it was reasonable for Hogan to think that the letter's scope limitation was shorthand for all of the preceding conduct as well as the ultimate action. Consequently, an investigation reaching beyond the limited issue of Hogan's denial of the career city carrier position could reasonably have been expected to grow out of Hogan's comprehensive EEO complaint. See Yamaguchi, 109 F.3d at 1480.

To allow this motion in limine would fly in the face of the Ninth Circuit's explicit command neither to interpret Title VII's procedural requirements too technically nor apply them too mechanically. See Ong, 642 F.2d at 318-19 (quoting Richerson, 572 F.2d at 95-96). At the same time, the Court recognizes the EEO's compelling need -- particularly in an age where claims of employment discrimination have increased markedly -- to limit the scope of its investigations. One would hope that the EEO might include in its letter, as a matter of fairness, an additional sentence directed toward informing the complainant of the future judicial significance of its limiting the investigation's scope. Here the Court denies Henderson's motion in limine. All Hogan's allegations are properly before the Court.

B. Henderson's First Motion for Partial Summary Judgment

Henderson has filed a motion for partial summary judgment arguing that: (1) because Hogan admitted in his deposition that he never requested time off during the period Molina was his supervisor, he cannot prevail on the issue of disparate treatment regarding time off; (2) because Hogan testified that he never complained to another supervisor or upper management regarding his perceptions that Molina was discriminating against him, Henderson must prevail on the issue of employer knowledge; and 3) Hogan's claims of discrimination founder because he is relying only on his subjective belief that he was a victim of such treatment and the questioned conduct was neither objectively abusive nor extreme The Court addresses these contentions *seriatim*.

1. Time Off Requests

Hogan alleges that while Hispanic workers were routinely given time off, non-Hispanic workers like himself enjoyed no such benefit. See Second Am, Comp ¶ 21. If based upon race, such disparate treatment affecting the terms and conditions of employment is precisely the type of evil Title VII is designed to address.[5] Yet, during Hogan's deposition, Henderson's questions yielded an important admission. When asked whether his Hispanic coworkers asked for time off and Molina granted their requests, Hogan responded, "I'm sure that's the way it worked." Hogan Dep, at 105. Yet, when asked whether he ever requested time off, Hogan had just explained, "I didn't ask for it." Id. at 104. In his memoranda, Hogan makes no attempt to explain away these statements. The admission is fatal to this claim of discrimination because it is axiomatic that discrimination only lies where similarly situated individuals are actually treated differently. See Burgess v. State of Washington Dept. of Corrections, No. 98-35417, 1999 WL 974182, at *3 (9th Cir. Oct. 22, 1999). Here, however, Hogan and his Hispanic colleagues are not similarly situated. Had Hogan made such a time off request and had Molina rejected it, then he and his Hispanic colleagues could properly be compared. Otherwise, they are not similarly situated. Thus, because Hogan admits that he never requested time off, Henderson is entitled to partial summary judgment with respect to this allegation of discrimination.

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[5] For purposes of this motion, the Court assumes, without deciding, that the refusal of time off requests constitutes an adverse employment action sufficient to affect the terms and conditions of employment.

2. Employer Liability

Henderson also contends that because Hogan admits that he never complained to a supervisor or any member of upper management regarding his belief that Molina was discriminating against him, the Postmaster General (i.e. Henderson), representing the employer Postal Service, cannot be held liable for Molina's conduct. Hogan responds by referencing the Supreme Court's holding in the sexual harassment case of Burlington, Indus., which specified that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate authority over the employee. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

Prior to 1998, the Ninth Circuit rule governing employer liability provided that an employer could be held liable for hostile work environment claims only when management-level employees "knew or should have known" about the ongoing harassment. See Burrell v. Star Nursery, Inc., 170 F.3d 951, 955 (9th Cir 1999); Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989). Under this standard, employers could be held responsible for the conduct of their supervising employees only if they were themselves in some way blameworthy. As a result, the standard shielded employers from liability arising from rogue supervisors who conducted themselves outside the bounds of the scope of their employment and in such a manner that the employer did not actually know nor should have known about the conduct. Henderson argues that neither he nor upper management was ever on notice of Molina's discriminatory treatment of Hogan, so liability for racially hostile work environment discrimination will not lie

In the companion cases of Burlington Indus. and Faragher v. Boca Raton, 524 U.S. 775 (1998), the Supreme Court announced a new test for determining when an employer is liable for a sexually-hostile work environment created by a supervisor. The Supreme Court held categorically that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Burlington Indus., 524 U.S. at 765. Of course, the Court recognizes that these two decisions arose in the context of sex discrimination claims, whereas Hogan alleges racial discrimination. In fact, Justice Thomas noted perceptively in his dissent that, in light of the majority opinion's holding, employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged." Burlington Indus., 524 U.S. at 767 (Thomas, J., dissenting). Thus, the question squarely presented is whether Burlington Indus. and Faragher apply to race-based hostile work environment claims.

The Ninth Circuit has not yet answered this question. See Williams v. Multnomah Educ. Serv. Dist., No. CIV. 97-1197-ST, 1999 WL 454633, at *6 (D. Or 1999). Instead, in an unpublished disposition entitled Meadows v. County of Tulare, No. 98-16412, 1999 WL 685960, at *1 (9th Cir, Sept. 1, 1999), the Ninth Circuit assumed, without deciding, that Burlington Indus. and Faragher applied to claims of race-based hostile work environment as well as claims of sexually- charged harassment.[6] Other circuit courts of appeal, meanwhile, have addressed this issue and all came to the same conclusion. The Fifth, Sixth, Eighth, and Tenth Circuits have definitively held that these recent Supreme Court sex discrimination cases apply to race discrimination claims as well. See Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 593 (5th Cir. 1998) (this panel opinion was first vacated, then reinstated by the en banc court save one unrelated section, in Williams v. Wal-Mart Stores, Inc., 182 F.3d 333, 333 [5th Cir. 1999]) ; Allen v. Michigan Dep' t of Corrections, 165 F. 3d 405, 411 (6th Cir. 1999); Gipson v. KAS Snacktime Co., No 98-1212, 1999 WL 153038, at *3 (8th Cir. Mar. 12, 1999); Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270 (10th Cir. 1998). While the Allen and Gipson courts were quick to conclude that identical standards should be used to evaluate racial and sexual hostile work environment claims, the Wright-Simmons court more expansively elucidated its reasoning. First, the Tenth Circuit noted that the majority opinion in Faragher itself expressed a preference for harmonizing the standards applied in racial and sex discrimination cases. See Wright-Simmons, 155 F.3d at 1270; see also Faragher, 524 U.S. at 787 n.1 ("Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards . . . "). The Tenth Circuit also recognized that Faragher and Burlington Indus. did not involve factual circumstances that were particularly unique to sexual harassment cases, e.g., quid pro quo harassment.

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[6] For the propriety of referring to an unpublished decision, see Giese v. Pierce Chemical Co., 43 F. Supp. 2d 98, 104 n.1 (D. Mass. 1999).

See Wright-Simmons, 155 F.3d at 1270. Moreover, as in the Ninth Circuit, the Tenth Circuit case law had traditionally applied the same standard with respect to employer liability in both racial and sexual hostile work environment cases. See id. Also, arguably revealing its intent regarding this question, the Supreme Court used a race discrimination example in explicating its reasoning in Faragher. See Faragher, 524 U.S. at 798. As one district judge sitting in the Ninth Circuit has concluded, "[i]t would be illogical to apply a different standard for employer liability in a Title VII case based on sexual harassment than in a Title VII case based on racial harassment since the Supreme Court has consistently applied the same standards to both types of claims." Williams, 1999 WL 454633, at *7. This Court finds the foregoing reasoning persuasive and holds that the standard announced by the Supreme Court's twin sex discrimination opinions applies to employer liability for racially hostile work environment claims.

Henderson's motion for partial summary judgment thus must be denied with respect to the issue of employer liability. Henderson's argument relies on the faulty premise that employer liability only lies where the employer knew or should have known about the inappropriate conduct and did nothing to remedy it. Not so. An employer is now subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate authority over the employee, regardless of the level of knowledge possessed by upper management. See Burlington Indus., 524 U.S. at 765. Thus, employer liability in hostile work environment cases now turns on the relationship between the victimized employee and the alleged harasser. Where the harasser is a supervisor with immediate (or successively higher) authority over the victim, employer liability will attach. Although Henderson provides probative evidence that the Postal Service could not be held liable for Molina's alleged racial harassment under the analysis required by the former "knew or should have known" rule, this evidence is altogether immaterial to the inquiry now called for by Burlington Indus. Consequently, Henderson's motion is denied insofar as it requests summary judgment on the issue of employer liability.

3. Severity and Pervasiveness of Hostile Work Environment

Henderson's third basis for requesting partial summary judgment pertains to the severity and pervasiveness of Molina's allegedly discriminatory conduct. Title VII provides a remedy for conduct giving rise to a hostile work environment where the employee proves that: (1) he was subjected to verbal or physical conduct of a harassing nature, (2) this conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. See Pavon v. Swift Trans. Co., Inc., 192 F.3d 902, 908 (9th Cir. 1999) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 [1986]). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." Harris v Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Henderson argues in short, that even if Hogan's allegations are taken as true, Molina's conduct was neither sufficiently severe nor pervasive, as matter of law, to alter the conditions of Hogan's position.[7] This

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[7] Curiously, Henderson also contends that a cause of action for hostile work environment arises only where a tangible employment action has occurred. Henderson claims that Burlington Indus. requires this result. Henderson, however, seriously misinterprets the case. The Supreme Court's holding specifically addressed the precise question of employer liability and did not speak directly to the elements of a hostile work environment case. See Burlington Indus., 524 U.S. at 765. Instead, the Court merely utilized the concept of a tangible employment action as a tool to address the employer liability issue there posed. See id. at 761 ("[W]e think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here."). Certainly, where the plaintiff is able to show that the conduct complained of rises to the level of a tangible employment action, then employer liability will necessarily follow. But even where no tangible employment action has occurred, the Supreme Court explains that a claim of hostile work environment discrimination lies, for which the employer will be liable (unless, of course, it can satisfy a two-part affirmative defense). Thus, to the extent that Henderson believes that a tangible employment action is required in order to recover under the hostile work environment theory, he is in error. In fact, the alternative theory of liability under Title VII alleged here was created precisely to address the sorts of discriminatory conduct that do not rise to the level of the "isolated and distinguishable events" of "hiring, firing, and promoting," but nonetheless result in a work environment so "heavily polluted with discrimination" as to alter the terms, conditions, or privileges of employment. See Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

Court agrees.

Hogan complains of two types of conduct that occurred during his service in the Rio Salado facility. First, he alleges that Molina often chatted in Spanish with the Hispanic workers, whereas Molina never chatted with him, nor made him feel welcome in any other manner. Additionally, Hogan alleges that he was often asked to perform the menial tasks while the Hispanic workers were rarely asked to do such tasks. Liability based on a hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . ." Harris, 510 U.S. at 21. In order to establish this claim, the plaintiff "must prove more than a few isolated incidents of enmity" and "[c]asual comments, or accidental or sporadic conversation" will not entitle the plaintiff to relief. Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986). Here, Hogan is unable to point to even one offensive "casual comment," which in any case would not amount to a hostile work environment. See id. Hogan in fact admitted that he never heard any offensive language either directly from Molina or from others claiming to have heard Molina disparage Hogan's race.[8] See Smith v. Planas, 975 F. Supp 303,

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[8] In response to questions from Henderson's counsel, Hogan's deposition testimony on this point is clear:

Q: Did he ever make a direct racially-tinged statement to you in conversations, you know, disparaging your racial background or anything?

A: I don't think so, no . . . .

Q: He never used the N-word or anything like that?

A: No, no, no.

Q: Did any of your coworkers come to you and say: Gee, 309 (S.D.N.Y. 1997). Although such evidence is often a touchstone for an actionable hostile work environment, one need not, of course, hear offensive language or feel offensive touching in order to have suffered such an environment, provided that the conduct complained of satisfies the severe and pervasive requirement. Here, the fact that his supervisor did not speak to him as often as he spoke to Hogan's Hispanic colleagues fails to add materially to Hogan's claim that he suffered a severely abusive workplace. Language can no doubt create barriers to unity within a mixed-language employment environment and it is thus understandable that Hogan felt alienated when his knowledge of English alone, at times, left him outside the social loop. But Title VII does not empower courts to apply a rule of law that would require employers to enforce language restrictions while on the job. There is nothing racist about Hogan's Hispanic supervisor and his coworkers speaking to each other in the language with which each is most comfortable. In addition, nothing in Title VII compels a supervisor to be amiable with any particular employee even when that supervisor pals around with other employees. Friendship relationships are truly a mystifying phenomena for one knows not why any particular pair connects or rubs each other the wrong way. Thus, Title VII permits people to have their differences; what it prohibits is abusive treatment generated from racial animosity. Ultimately, all Hogan can point to is a feeling he has that Molina doesn't speak to him because of this prohibited

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Molina called you a blah, blah, blah?

A: No.

Q: There was nothing? There was no overt statement, racial statement.

A: Not directly to me.

Hogan Dep at 111.

animosity. But no matter how strongly Hogan is convinced that Molina harbors this prohibited animosity -- and the Court does not doubt that Hogan truly believes it -- and while this feeling may have made his experience at Rio Salado less comfortable, not being spoken to by one's supervisor is, as matter of law, not severe and abusive treatment.

Hogan's allegation that Molina asked him to perform menial tasks while his Hispanic co-workers were asked to do the same work only rarely presents a closer question. To be clear, Hogan admits that these tasks were generally within the responsibilities of a casual employee. Instead, his complaint is directed toward the relative number of occasions he was requested to perform such tasks as compared to his colleagues. The Court assumes for purposes of this motion that Hogan subjectively believed that such treatment was hostile. Thus, the question posed for the Court is whether this conduct is sufficiently severe and pervasive "to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive." Harris, 510 U.S. at 21. If this were a motion to dismiss in which Henderson was arguing that under no circumstances could a claim for hostile environment arise where a supervisor assigns menial tasks only to employees of one race, then the Court might well reject Henderson's contention. One can conceive of a scenario, i.e., the repeated and consistent assignment of workers of one racial group to perform the most arduous or demeaning tasks, that would justify a reasonable person finding such conduct hostile or abusive simply because one has been subjected to demeaning tasks on the basis of race.

Here, however, Hogan is faced not with a motion to dismiss but with one for summary judgment. He can no longer rely on the bald allegations in his complaint with respect to his treatment. See Nissan Fire & Marine Ins. Co., Ltd. v Fritz Companies, Inc., No. 98-16024, 2000 WL 461462, at *2 (9th Cir. Apr. 25, 2000).

Instead, he must bring forth relevant evidence, by affidavit, deposition testimony, or other sources, which tends to show a genuine issue of material fact exists regarding the severity and pervasiveness of the alleged conduct. He marshals no such evidence. Instead, apparently failing to recognize the distinction between the disparate treatment and hostile work environment theories, Hogan simply argues that he has discharged his duty to present a prima facie case of discrimination, and that he has no duty to prove anything further. As a result, the Court is left with Hogan's unsworn statement in his complaint that he was often assigned the menial tasks while Hispanic employees were rarely asked to do these tasks. See Am. Compl. ¶ 23. But even if this were evidence, as is required by Rule 56, the Court could not reasonably infer that the conduct complained of was both severe *and* pervasive. Hogan fails to specify how many times he was asked to perform these tasks or how "rarely" his Hispanic colleagues were asked to do these tasks. Thus, a ruling that the conduct was pervasive is impossible. One must remember that whoever has the burden of proof at trial on a particular issue has the burden to produce evidence on summary judgment with respect to that issue as well, Hogan, as the plaintiff in this discrimination case, has the burden to prove at trial that the conduct was severe and pervasive. Having failed to provide evidence on this issue, summary judgment in favor of Henderson is in order on the hostile work environment claim.[9]

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[9] To the extent that Hogan is relying only on a disparate treatment theory and not on a hostile work environment theory, summary judgment in favor of Henderson is equally warranted because actionable disparate treatment requires proof of an adverse employment action and courts have consistently held that being assigned to perform demeaning work assignments that are nonetheless within one's job description does not constitute an

C. Henderson's Second Motion for Partial Summary Judgment

Henderson also moves for partial summary judgment on the key issues of whether Hogan was denied employment first as a casual employee and also as a permanent letter carrier on account of his race. As to each of these adverse employment actions, Hogan alleges that Molina's unjustifiably critical recommendation doomed his candidacy. For the purposes of this motion, the Court assumes that the disputed recommendation actually influenced both decisions. As to both allegations of discrimination, Henderson first contends that Hogan fails to shoulder his burden of establishing a prima facie case of racial discrimination. Henderson argues that because Hogan relies only on his subjective belief that discrimination was afoot but provides no objective evidence to suggest the same, as matter of law he fails to show that he was discriminated against because of his race. Alternatively, Henderson asserts that Hogan was denied the positions because his negative performance evaluations were justifiable. Each allegation of discrimination is considered in turn.

1. City Letter Carrier Position

Title VII of the Civil Rights Act of 1964, as amended, provides that "[a]ll personnel actions affecting employees . . . in the United States Postal Service . . . shall be made free from any discrimination based on race . . . ." 42 U.S.C. § 2000e-16(a). As a former employee of the United States Postal Service, Hogan claims the protection of this provision. To establish a prima facie

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adverse employment action. See, e.g., Stevens v. Glickman, No. 97-56-SLR, 1999 WL 825603, at *17 (D. Del. Sept. 30, 1999); Hou v. New York City Dep't of Envtl. Protection, No. 98 CIV 9569 (LBS), 1998 WL 531829, at *2 (S.D.N.Y. Aug. 24, 1998; Briscoe v. Fred's Dollar Store, 822 F. Supp. 1353, 1354 (E.D. Ark. 1993).

case of employment discrimination, a plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A plaintiff can establish a prima facie case by providing direct evidence that the "employment decision was based on a discriminatory criterion illegal under the [Civil Rights] Act." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977), cited in Cordova v. State Farm Ins. Cos., 124 F.3d 1145, 1148-49 (9th Cir. 1997). If such direct evidence cannot be mustered, the plaintiff can instead rely on the familiar McDonnell Douglas framework to give rise to an inference of unlawful discrimination. See McDonnell Douglas Corp. v Gureen, 411 U.S. 792, 802 (1973). Here, because direct evidence is lacking, Hogan must show that: (l) he belongs to a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) he was rejected despite his qualifications; and (4) after his rejection, the position remained open and the employer continued to seek applications from persons with comparable qualifications. See Cordova, 124 F.3d at 1148 (citing McDonnell Douglas, 411 U.S. at 802). "The requisite degree of proof necessary to establish a prima facie case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994); see also Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991) ("[T]he amount [of evidence] that must be produced in order to create a prima facie case is 'very little.' "). The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

There is no dispute that, as an African-American, Hogan is a member of a protected class. Furthermore, there is no dispute that Hogan applied for the city letter carrier position The parties also do not dispute that he was denied the position, which was subsequently filled by other candidates. His proof founders, however, on the "qualified for the position" requirement. See Fernandez v Wynn Oil Co., 653 F. 2d 1273, 1275 (9th Cir. 1981) ("If an applicant is not qualified for the job in question, she has failed to establish a prima facie case.") Kyle v. Campbell Soup Co., No 92-16125, 1994 WL 5756, at *2 (9th Cir. Jan 7, 1994) (unpublished opinion). With respect to this issue, Hogan provides his EEO affidavit in which he asserts that "it became increasingly clear that I, among our crew, had the best possibility to become a regular postal employee. Some of our crew members had driving problems or didn't pass the postal exam or were not veterans or had other problems that excluded them. I, alone . . . met all of the qualifications." Def.'s Reply to Mot In Limine Ex. A at 4. Hogan also provides his postal exam score and documentation regarding his service in the Air Force as well as a number of highly favorable reviews from his other supervisors regarding his work as a casual employee. See Hogan Aff. Exs. M11, M12, M29. Yet, this evidence simply does not prove that he was qualified for the city letter carrier position.

Nowhere does Hogan describe the duties of a city letter carrier, let alone the qualities a candidate should have in order to carry out those duties. The best the Court can infer from Hogan's contentions is that it is necessary to be a good driver and pass the postal exam. Perhaps veterans are given a preference. But Hogan points to no evidence in the record -- by affidavit, deposition testimony, or any other source -- regarding the extent to which these qualifications are relevant, if at all. Even assuming that the United States Postal Service is concerned about driving ability, examination scores, and military service, surely there is more to the position of city letter carrier. Yet, the Court is unable to evaluate Hogan's qualifications for the position without knowing what the position entails and the qualifications necessary to perform the position's responsibilities. Furthermore, Hogan's claim that he alone met the qualifications of the position is nothing more than a conclusory statement and simply does not constitute evidence, as is required by Rule 56. See Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1418-19 (9th Cir. 1988) (holding that conclusory allegations of discrimination insufficient to avoid summary judgment). Rather than provide important details about the position for which he applied and the qualifications he possesses that are relevant to the position, Hogan claims -- but fails to provide any objective evidence to suggest -- that his coworkers were inferior to him. While a Title VII plaintiff normally need not prove his or her superiority over the chosen candidate in order to establish a prima facie case, this evidence would nonetheless suffice to prove one's qualifications for the position. See Foster v. Arcata Assocs., Inc., 772 F.2d 1453, 1460 (9th Cir. 1985), cert. denied 475 U.S. 1078 (1986) ("Foster was required only to produce evidence . . . about whether she possessed the minimum qualifications for the job, not whether she was as qualified or more so than the person whom Arcata selected."), superceded on other grounds by Kennedy v. Allied Mut. Ins. Co., 952 F. 2d 262 (9th Cir. 1991). Evidence that might bolster Hogan's conclusory allegation would be his coworkers' inferior postal exam scores or documents relating to their poor driving records (again assuming that these factors are even relevant to the position). Instead, the only evidence in the record with respect to his coworkers, including another African-American employee named Kyle Johnson, are a series of evaluations that favorably comment on their performances. See Hogan Aff. Exs. M46-M49. Even had he provided objective data proving that, among his coworkers, he was the most qualified, he provides no evidence to suggest that only individuals from his crew were eligible for the position. The Postal Service, presumably, was free to look beyond the group of individuals with whom Hogan worked in order to locate the proper candidates to fill the city letter carrier position If this were not the case, Hogan needed to provide evidence indicating that the pool of candidates with whom he was competing was limited to his crew.

Furthermore, his earlier favorable reviews regarding his performance as a casual employee are not particularly probative of whether he would be qualified for the city letter carrier position since Hogan has provided no evidence suggesting that the positions were similar. Hogan, of course, could have been a topnotch sorter on the floor of the Rio Salado facility, but nonetheless be ill-equipped to handle the responsibilities of the city letter carrier position -- whatever those may be. While the Court, on summary judgment, is bound to take all reasonable inferences in favor of the nonmoving party, it would be unreasonable for the Court to infer that merely because some supervisors contended that Hogan performed one job for the Postal Service well he necessarily would be qualified to perform any other Postal Service position. Hogan has not proved that he was minimally qualified for the position of city letter carrier. As a result, Hogan fails to prove an essential prong of the prima facie case and thus the presumption of unlawful discrimination does not arise. Consequently, as to this aspect of the case, summary judgment in favor of Henderson is in order.

2. Continuing Employment as Temporary Employee[10]

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[10] Henderson points out that Hogan had already worked the maximum number of days available in a given year for a casual employee and thus could not be hired as a continuing casual. Hogan admits the truth of Henderson's contention, but nonetheless

While Hogan clears the prima facie case hurdle with respect to his desire to continue working in the same capacity at the Rio Salado facility, he stumbles in the later stages of the McDonnell Douglas analysis. Again, there is no dispute that Hogan is a member of a protected class, that he applied for and was denied the continuing position, and that the Postal Service subsequently filled the position with another candidate. See Cordova, 124 F.3d at 1148 (listing elements of prima facie case) . There is some question regarding Hogan's qualifications for the position, but unlike his bare, unsubstantiated claim that he was qualified for the city letter carrier position, Hogan presents evidence to indicate his ability to perform the responsibilities of his position as a casual employee. In particular, he not only provides numerous favorable recommendations from supervisors other than Molina, he also points to Molina's January 1994 favorable evaluation. Thus, Hogan satisfies his burden of laying out the prima facie case.

Yet, even though Hogan satisfies his preliminary responsibility of proving a prima facie case, Henderson satisfactorily rebuts the presumption and Hogan fails to show that racial discrimination motivated the decision to deny rehiring him. Once a plaintiff has established a prima facie case, a presumption of employment discrimination arises and the burden of going forward shifts to the defendant to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the employment action. See Cordova, 124 F.3d at 1149

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argues that the Postal Service could have hired him to perform the same work under the temporary employee classification. Since Henderson does not quarrel with Hogan's representation, the Court will entertain Hogan's claim that he was discriminated against when he was denied continuing employment as a temporary employee.

(citing Wallis, 26 F.3d at 889); see also Burdine, 450 U.S. at 254.[11] Here, Henderson submits evidence that Hogan was denied the position because his overall performance had been "marginal" and that he required constant supervision due to his wandering away from his work area. See Molina Aff. ¶ 10, Ex. I. Poor employee performance is the quintessential legitimate, nondiscriminatory reason explaining an adverse employment action. Having cited it as the motivating reason for the decision and supported it with a contemporaneous writing and deposition testimony, Henderson has borne his burden of going forward.

Since "the ultimate burden of persuading the trier of fact the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 518 (1993) (quoting Burdine, 450 U.S. at 253), at this juncture -- now that the presumption of discrimination is gone -- Hogan "must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible." Lindahl v. Air France, 930 F.2d 1434, 1438 (9th Cir. 1991) (citing Steckl v. Motorola, Inc., 703 F.2d 392, 393 [9th Cir. 1983]). Nonetheless, "because of the inherently factual nature of the inquiry, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact." Id.

> [A]ny indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder. Once a prima facie case is established . . ., summary judgment for the defendant will ordinarily not be appropriate

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[11] The nomenclature used by the courts in implementing the McDonnell Douglas paradigm is distressingly inconsistent and confusing. For this Court's understanding of how the process works, see Terry v. Elec. Data Sys., 940 F. Supp. 378, 381-82 (D. Mass. 1996).

> on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination."

Lowe, 775 F.2d at 1009 (quoting Burdine, 450 U.S. at 255 n.8).

In Godwin v. Hunt Wesson, Inc.,150 F.3d 1217, 1220-22 (9th Cir. 1998), the Ninth Circuit clarified what amount of evidence was necessary for a Title VII plaintiff to forestall summary judgment after an employer has articulated a legitimate nondiscriminatory reason for the adverse employment action. The court explained that it "depend[ed] upon the nature of the plaintiff's evidence." Id. at 1221. The two varying standards "stem[] from the Supreme Court's holding that the plaintiff may establish pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " Id. at 1220 (quoting Burdine, 450 U.S. at 256). The Ninth Circuit explained that when "the plaintiff offers direct evidence of discriminatory motive, [a] triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." Id. at 1221. Among the examples the Ninth Circuit cited as representing direct evidence were Cordova, where the employer referred to a Mexican-American employee as a "dumb Mexican," and Lindahl, where the employer believed that the female candidates get "nervous" and "easily upset." Cordova, 124 F.3d at 1150; Lindahl, 930 F.2d at 1438. As the Fifth Circuit has made clear, "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." Davis v. Chevron, U.S.A., Inc., 14 F.3d 1082, 1085 (5th Cir. 1994). Comments such as those in Cordova and Lindahl directly suggest the existence of bias and no inference is necessary to find discriminatory animus. Thus, because direct evidence is highly probative of the employer's underlying motivation, the amount of such evidence produced by the plaintiff need not be substantial. Alternatively, where, as here, the plaintiff is unable to point to direct evidence, he or she "may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable." Godwin, 150 F.3d at 1222. Unlike direct evidence, "such evidence of 'pretense' must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of [race]." Id. The Ninth Circuit's analysis is in accord with the most recent Supreme Court decision on this issue. See Reeves v. Sanderson Plumbing Prods., Inc., __U.S. ___, ___ S. Ct. ___, No 99-536, 2000 WL 74663, at *9 (June 12, 2000). In Reeves, the Supreme Court explicitly held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. As a result, Hogan can withstand Henderson's summary judgment attack if he can show, by specific and substantial evidence, that Henderson's proffered motives were not the actual motives.

Hogan does not meet the challenge. Hogan's primary argument on this point is that Molina's June 1994 negative evaluation could not have been accurate in light of the favorable evaluation Molina completed on behalf of Hogan in January of 1994. A supervisor's assessment of an employee can, however, change over the course of nearly half a year, just as an employee's performance can change over the same duration. There is nothing objectively suspicious about a favorable recommendation being followed some five to six months later by a negative evaluation. Furthermore, the primary reason upon which Molina relies during this lawsuit to justify his decision, i.e., Hogan's often wandering from his workstation without permission, was the same reason he cited in his contemporaneous evaluation. See Godwin, F.3d at

1222 (noting that inconsistency between the explanation advanced during litigation and the reasons offered contemporaneously with the adverse employment action constituted relevant evidence of pretext). Hogan fails to provide the "specific" and "substantial" evidence that the Ninth Circuit requires to prove that the offered justification is pretextual. Indeed, he provides no such relevant evidence at all. Consequently, the Court grants summary judgment to Henderson on Hogan's claim that Molina discriminated against him when his allegedly false evaluation resulted in Hogan's failure to be continued as a temporary employee.

V. Conclusion

Pursuant to the foregoing analysis, the Court DENIES Henderson's Motion in Limine [docket no. 68-l] but GRANTS Henderson's two Motions for Partial Summary Judgment [docket nos. 83-1 and 89-1]. As no other issues remain for decision, judgment shall enter for the defendant Henderson.

S/

WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

Filed January 29, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 00-16479
CT/AG # No. CV-96-01189-WGY

PERCY J. HOGAN

Plaintiff - Appellant

v.

MARVIN J. RUNYON, Postmaster General; SIMON M. MOLINA

Defendants - Appellees

- - - - - - - - - - - - - - -

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered July 20, 2001

Filed July 20, 2001
Cathy A. Catterson, Clerk
US Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 00-16479
D.C. No. CV-96-01189-WGY

MEMORANDUM[*]

PERCY J. HOGAN

Plaintiff - Appellant

v.

MARVIN J. RUNYON, Postmaster General; et al.,

Defendants - Appellees

- - - - - - - - - - - - - - - -

APPEAL FROM the United States District Court
for the District of Arizona (Phoenix).
William G. Young, District Judge, Presiding

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Submitted July 9, 2001[**]

Before: KOZINSKI, T. G. NELSON, and TALLMAN, Circuit Judges.

Percy J. Hogan, a former employee of the United States Postal Service, appeals pro se the district court's judgment, pursuant to dismissal orders and partial summary judgment, in favor of defendants in his racial discrimination action, pursuant to 42 U.S.C. § 2000e-16, 42 U.S.C. § 1983, and his private right of action for emotional distress and punitive damages. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment, *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998), and we affirm.

Because Hogan failed to provide evidence establishing that similarly situated employees were not treated equally, *see Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981), and because Hogan failed to provide evidence of racial hostility that was sufficiently severe and pervasive to alter his working conditions, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), we affirm the district court's grant of defendants' first motion for partial summary judgment.

Because Hogan's evidence that he was qualified for the letter carrier position is based only on his conclusory statements, *see Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d 1409, 1419 (9th Cir. 1988), and because Hogan failed to provide direct and substantial evidence that defendants' proffered reasons for not continuing his employment as a casual employee were pretexual, *see Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994), we affirm the district court's grant of defendants' second motion for partial summary judgment.

[**] The panel unanimously finds this case suitable for decision without oral argument, and denies Hogan's request for oral argument. See Fed. R. App. P. 34(a)(2).

Contrary to Hogan's contentions, the district court properly dismissed Hogan's section 1983 and tort claims because Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment, and because Hogan's claims are not of the magnitude required by this court to include beyond Title VII. *See Brock v. United States*, 64 F.3d 1421, 1423-24 (9th Cir, 1995).

The district court properly exercised its discretion by denying Hogan's motion to compel because he failed to comply with a local rule. *See Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986). Furthermore, the district court did not abuse its discretion by denying Hogan's motions to strike defendants' motions to dismiss because Hogan failed to show prejudice or that defendants acted in bad faith. *See Marx v. Loral Corp.*, 87 F.3d 1049, 1054 (9th Cir. 1996).

We lack jurisdiction to review Hogan's motion for reconsideration because he failed to file a separate notice of appeal following the district court 's September 14, 2000, order. *See Kock v. Hankins*, 928 F.2d 1471, 1475 (9th Cir. 1991).

Hogan's remaining contentions lack merit.

AFFIRMED

Filed January 17, 2002
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PERCY J. HOGAN, Plaintiff-Appellant, v. MARVIN J. RUNYON, Postmaster General; et al., Defendants-Appellees.	No. 00-16479 DC# CV-96-01189-WGY Arizona (Phoenix) ORDER

Before: KOZINSKI, T.G. NELSON, and TALLMAN, Circuit Judges

Appellant's motion for a second extension of time and motion to exceed type-volume limitations are granted.

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.

Filed February 11, 1999
Clerk US District Court Arizona

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 6-1189-PHX-ROS

PERCY J. HOGAN,)
)
Plaintiff,) **ORDER**
vs.)
)
MARVIN T. RUNYON, JR.,)
Postmaster General; SIMON M. MOLINA;)
THE ATTORNEY GENERAL FOR THE)
UNITED STATES; THE UNITED)
STATES ATTORNEY FOR THE)
DISTRICT OF ARIZONA; and THE)
UNITED STATES POST OFFICE,)
)
Defendants.)
)

Plaintiff Percy Hogan, a pro se litigant, filed this action alleging that the Defendants discriminated against him based on race by: treating him less favorably while he was employed by the United States Postal Service as a substitute employee classified as casual; and failing to either renew his term or offer him a permanent position. He seeks damages pursuant to Title VII, 42 U.S.C. § 2000e et seq., as well as 42 U.S.C. §1983 and the tort of infliction of emotional distress.

Defendants have filed a Motion to Dismiss Improper Party Defendants and a Motion to Strike the claim Plaintiff brings pursuant to 42 U.S.C. § 1983, the common law tort claim, and the demand for punitive damages. Because Defendants bring the Motion to Strike certain claims pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court will treat this portion of the motion as a Motion to Dismiss.

Plaintiff has filed three Motions to Strike Defendants' Motions for failure to comply with the Court's scheduling order setting a deadline of January 31, 1998, for motions brought pursuant to Federal Rule of Civil Procedure 12(b). Although Defendant filed the two-part Motion to Dismiss and to Strike on March 2, 1998, the late filing did not prejudice the Plaintiff's ability to develop his case.

The Court also notes that Plaintiff has not always complied with its orders either. After obtaining letters from Plaintiff on March 7 and March 17, 1997, the Court, on March 18, 1997, ordered Plaintiff to file motions if appropriate in the future rather than corresponding with the Court. Despite this order, Plaintiff sent the Court another letter in August, 1997, and the Court had to order Plaintiff once again to refrain from such correspondence. On another occasion, Plaintiff filed a "response" to Defendants' Reply regarding a Motion in Limine. The rules do not allow a second response; moreover, the Court had denied Plaintiff's request for a time extension to file the response. The Court struck the response.

Due to lack of prejudice and both parties' failure to fully comply with all orders, the Court will deny Plaintiffs' Motions to Strike. The Court urges both parties to fully comply with its orders in the future.

Proceeding to Defendants' Motions, the Court begins by considering the Motion to Dismiss the claim Plaintiff brings pursuant to 42 U.S.C. § 1983 and the common law tort claim. Title VII "'provides the exclusive judicial remedy for claims of discrimination in federal employment.'" Brazil v. United States

Dept. of the Navy 66 F.3d 193, 197 (9th Cir. 1995) (quoting Brown v. General Servs. Admin., 425 U.S. 820, 835, 96 S.Ct. 1961, 1969 (1976)), cert. denied sub nom. Brazil v. Dalton, 517 U.S. 1103 (1996). See also Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995). A limited exception to the exclusivity of Title VII exists for federal employees who suffer "highly personal wrongs." Id. Wrongs sufficiently egregious to fall within this category include: rape, see id.; stalking the purported victim combined with harassing phone calls and defamatory remarks about the purported victim's sexuality, see Otto v. Heckler, 781 F.2d 754, 757-58 (9th Cir. 1986), as amended, 802 F.2d 337 (9th Cir. 1986); and sexual harassment including fondling of the knees and breast plus kissing, combined with at least one incident of trapping the purported victim in a room after engaging in such conduct. See Arnold v. United States, 816 F.2d 1306,. 1311-12 (9th Cir. 1987).

To determine whether Title VII is the exclusive remedy available to Plaintiff, it is necessary to examine the allegations of Plaintiff's complaint to discover whether they include highly personal wrongs of the type described above. See Brock, 64 F.3d at 1423. Plaintiff alleges that his supervisor, Simon Molina, accused him of conspiring to slow down the work flow of coworkers in order to obtain extra overtime hours. Plaintiff alleges that this accusation was false and occurred due to his race, Black. He also alleges that Molina, a Hispanic, consistently favored Hispanic employees by giving them time off denied to Plaintiff and other non-Hispanic employees, spending time chatting with the Hispanic employees while barely speaking to Plaintiff, and requiring Plaintiff to do more of the unpleasant tasks such as sweeping and machine maintenance. Plaintiff further alleges that Molina gave him an unjust negative evaluation stating that Plaintiff's work performance was marginal and Plaintiff required constant supervision. As a result of this evaluation, Plaintiff alleges, his casual employment term was not renewed and he did not obtain the permanent carrier position for which he had applied. According to the allegations contained in Plaintiff's complaint, the unjust evaluation was a pretext for race discrimination.

Plaintiff's allegations are clearly sufficient to state a claim of illegal discrimination, but they do not set forth highly personal wrongs of the egregious nature described above. See id., 64 F.3d at 1423. Plaintiff does not allege that Molina acted violently toward Plaintiff, threatened him with violence through either words or conduct such as stalking, or engaged in consistent inappropriate physical contact with Plaintiff along with trapping him in a room. Nor does Plaintiff allege conduct of a different type but equally egregious in nature. The exception to is unavailable to Plaintiff and thus Title VII provides the exclusive judicial remedy for his employment discrimination claims. Brazil, 66 F.3d at 197. Therefore, the Court will dismiss Plaintiff's 42 U.S.C. § 1983 claim and his tort claim.

Having determined that Plaintiff has only a Title VII claim, the Court moves to Defendants' request to strike Plaintiff's demand for punitive damages. Governments, government agencies, and political subdivisions of government cannot be assessed punitive damages for violations of Title VII 42 U.S.C. § 1981a(b)(1). For purposes of this statute, the United States Postal Service constitutes a government agency. Robinson v. Runyon, 149 F.3d 507, 515-16 (6th Cir. 1998); Baker v. Runyon, 114 F.3d 668, 669 (7th Cir. 1997), cert. denied sub nom. Baker v. Henderson, 119 S.Ct. 335 (1998); Cleveland v. Runyon, 972 F. Supp. 1326, 1330 (D. Nev. 1997). The Court will strike the demand for punitive damages.

Finally, the Court considers Defendant's Motion to Dismiss all Defendant other than Postmaster General Marvin

Runyon. In Title VII actions against the Postal Service, the Postmaster General is the only appropriate defendant. Soto v. United States Postal Serv., 905 F.2d 537, 539 (9th Cir. 1990), cert. denied, 498 U.S. 1027 (1991); Mahoney v. United States Postal Serv., 884 F.2d 1194, 1996 (9th Cir. 1989). Therefore, the Court will dismiss the following Defendants: the Attorney General for the United States, the United States Attorney for the District of Arizona, the United States Post Office, and Simon M. Molina.

Accordingly,

IT IS ORDERED denying Plaintiff's Motions to Strike. (Dkt. ## 46, 47, 54).

IT IS FURTHER ORDERED treating Defendants' Motion to Strike certain claims as a Motion to Dismiss, granting the Motion, and dismissing the claim brought pursuant to 42 U.S.C. § 1983 and the tort claim. (Dkt. # 44-2).

IT IS FURTHER ORDERED granting Defendants' Motion to Strike Plaintiff's demand for punitive damages. (Dkt. # 44-2).

IT IS FURTHER ORDERED granting Defendants' Motion to Dismiss and dismissing the following Defendants: the Attorney General for the United States, the United States Attorney for the District of Arizona, the United States Post Office, and Simon M. Molina. (Dkt. # 44-1).

DATED this 9th day of February, 1999.

S/

ROSYLYN O. SILVER
UNITED STATES DISTRICT JUDGE

Filed July 3, 2000
Clerk US District Court Arizona
DKT #113

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PERCY HOGAN,)
Plaintiff,)NO. CV 96-1189
) PHX ROS(WGY)
vs.)
MARVIN T. RUNYON, JR.)
Postmaster General,)
UNITED STATES POSTAL)
SERVICE and SIMON)**JURY TRIAL DEMANDED**
SIMON MOLINA, et al.)

PLAINTIFF'S MOTION IN LIMINE AND FOR SANCTIONS

Plaintiff requests that the court enter sanctions against defendant, for the following reasons:

1. Defendant is the custodian of the only record evidence in this case. Defendant's EEO investigator refused to collect and preserve the comparative evidence necessary to prove or disprove racial discrimination in the workplace.

2. Defendant, through counsel, has refused to provide the requested evidence - defying the Federal Rules of Civil Procedure, the court's Scheduling Order, direct orders of the court and plaintiff's many requests.

3. In failing to provide the requested records, defendant has greatly prejudiced plaintiff's ability to prove or disprove facts.

4. Would the court kindly consider Rule 37 of the Federal Rules of Civil Procedure as a possible remedy?

5. Federal Rule of Civil Procedure 37 provides:

> *For purposes of this subdivision, an evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond.*

6. Rule 37(c) of the Federal Rules of Civil Procedure provides:

> *(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. . . . these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule . . .*

7. Where relevant information is in the possession or control of a defendant and is not provided, then an adverse inference may be drawn that such information would be harmful to defendant.

8. Defendant's failure to preserve material evidence was either the result of gross negligence or was intended to prevent plaintiff's from proving his case. Defendant's concealment of requested information demonstrates a conscious and reckless disregard for discovery obligations.

9. Sanctions for discovery abuses are proper upon a finding of wilfullness and/or bad faith on the part of the noncomplying party.

10. Defendant's gross negligence and failure to attempt to comply in good faith with its discovery obligations justifies an adjudication of the case against it under the rule providing for sanctions for failure to make disclosure or cooperate in discovery.

11. A default judgement on the critical element of claim, though a severe sanction for discovery violations, should be granted when

a defendant fails to comply with a further discovery order and specific requests for documents previously acknowledged to exist.

WHEREFORE, plaintiff requests that the court:

A. Deny defendant the use of any witness, fact or record in its possession that has been requested by plaintiff or that should have been disclosed in its initial disclosure or in a supplemental request had the facts been known.

B. Plaintiff further requests that the court enter default judgement against defendant, based on defendant's recurring

1. obstruction of discovery,
2. refusal to provide court ordered discovery and
3. destruction of discoverable evidence.

Respectfully submitted,

S/______________________________
PERCY HOGAN, JR

MEMORANDUM OF POINTS AND AUTHORITIES

A. STATEMENT OF FACTS

i. Working for Defendant

Plaintiff worked at defendant's "General Mail Facility" from November 30, 1992 to December 31, 1992, as a "Christmas casual."

June 28, 1993 to June 29, 1994: plaintiff worked at defendant's Rio Salado facility in Phoenix, Arizona. About 20 employees worked on plaintiff's shift. Plaintiff was one of the two black employees in the unit. John Camu, Luz Gonzalez and Al Hansen were plaintiff's supervisors, until September 1993. The supervisors made all scheduling decisions.

From June 28, 1993 to June 29, 1994, defendant classified plaintiff as a "casual employee" - part of defendants' supplemental work force. There were, at least, nine casual employees in plaintiff's unit during each three-month contract period. Defendant required "casual employees" to work under three-month contracts. There were four contract periods every year. At the end of each contract period, a supervisor's positive recommendation was a prerequisite for renewal of the contract.

In September 1993, defendant divided the work on the floor between supervisors. Simon Molina, a person of Mexican descent, had been a supervisor-trainee for six months (May 1993 to September 1993). He became a partial supervisor in plaintiff's unit.

There were, at least, twenty-five permanent "regular employees" who worked in plaintiff's unit, during the three-year period pertinent to this lawsuit.

In addition, defendant hired, at least, twenty "Christmas casuals" every year. For Christmas 1993, the partial supervisor, Simon Molina, hired sixteen to twenty "Christmas casuals" (out of a possible 10,000 applicants). All of the "Christmas casuals," hired by Molina, were Mexican women.

On June 29, 1994, Defendant refused to renew plaintiff's three-month "casual employment contract." Defendant's refusal to renew plaintiff's contract also eliminated plaintiff from consideration for the Veterans' Readjustment Act (VRA) program. The VRA program was a government hiring procedure which gave military veterans preference. Plaintiff, a Vietnam veteran, was the only individual in plaintiff's unit who met all of the requirement for employment under the VRA program.

On or about July 22, 1994, plaintiff inadvertently discovered that the partial supervisor in plaintiff's unit, Simon Molina, had submitted a false evaluation of plaintiff's work performance. That negative recommendation was the reason defendant refused to renew plaintiff's three-month contract as a casual employee or consider plaintiff for rehire under the VRA program. Thus, plaintiff's employment for defendant terminated.

ii. Defendant's Equal Employment Opportunity Investigation

On August 15, 1994, plaintiff filed a complaint of racial discrimination with the United States Postal Service's Equal Employment Opportunity (EEO) office. See **Exhibit 1**: "EEO Request for Counseling Intake Form."

On November 23, 1994, the EEO Investigator, Elaine Jones, asked plaintiff to supply the *"names of similarly situated individuals whom you believe were treated differently than you."* See **Exhibit 2**: November 23, 1994 "Notice of Right to File Individual Complaint," Item 4, page I-7 and EEO Complaint of Discrimination in the Postal Service.

December 9, 1994: Plaintiff filed a formal complaint against defendant. Defendant's EEO office investigation of that complaint began on February 2, 1995. See **Exhibit 3**: Letter to plaintiff from J.J. Brozell, dated February 2, 1995.

On February 8, 1995, EEO Office Investigator Elaine Jones again requested the "*Names of Comparative (similarly situated) employees who were treated differently than you.*" See **Exhibit 4**: Letter to plaintiff.

On March 8, 1995, plaintiff's former partial supervisor, Molina, denied that racial discrimination was a factor in his negative evaluation of plaintiff. See **Exhibit 5**: EEO Investigative Affidavit, dated March 8, 1995.

Seven months later, on October 12, 1995, defendant's EEO Office completed its investigation. See **Exhibit 6**: Notification of Completed Investigation.

Defendant's EEO office, on February 7, 1996, rendered its "*Final Agency Decision,*" concluding that plaintiff "*failed to prove a prima facie case of discrimination based on race, when he was unable to demonstrate that he had been treated differently than other comparative employees in a similar situation.*" It issued a "*Notice of Right to File Civil Action*" in a United States District Court within 90 days. See **Exhibit 7**: EEO Investigative report, page 3.

iii. Defendant's Refusal to Cooperate with Discovery and Destruction of Evidence of Racial Discrimination

Plaintiff sued defendant, for unlawful racial discrimination, on May 7, 1996. Defendant filed an Answer, denying that it discriminated against plaintiff.

The Court entered a Scheduling Order, under Rule 16 of the Federal Rules of Civil Procedure. The Order required:

> . . . *the parties to make Initial Disclosures by "November 14, 1997.*" See **Exhibit 8**: Rule 16 Scheduling Order, paragraph B, page 1.
>
> . . . *all discovery, including answers to interrogatories, supplements, production of documents, depositions and*

> *requests to admit, be completed by "August 14, 1998."* See **Exhibit 8**, paragraph F, page 2.
>
> *This Order contemplates that each party will conduct discovery to permit completion within the deadlines. Any discovery which results in insufficient time to undertake the necessary additional discovery and which requires an extension of the discovery deadline will be met with disfavor, will only be granted for good cause shown, and may result in denial of an extension, exclusion of evidence, or the imposition of sanctions.* See **Exhibit 8**, paragraph J, page 3.

Defendant did not comply with the court's requirement of "Initial Disclosure." Specifically, on or before [or after] November 13, 1997, defendant did not disclose the following:

1. names or addresses of individuals,
2. a description by category and location of documents or other things,
3. a copy of any documents (including plaintiff's personnel file), or
4. the identities of the approximately 139 employees at defendant's facility who worked in plaintiff's unit. The employees defendant omitted include, at least, 54 casual employees, 60 Christmas casual employees and 25 regular employees. See **Exhibit 9**: defendant's Initial Disclosure; See also Plaintiff's Initial Disclosure - potential witness list.

On November 14, 1997, plaintiff wrote a letter to defendant's attorney, John Mayfield, requesting that defendant disclose the omitted informtion, as required by Federal Rule of Civil Procedure #26. See **Exhibit 10**: November 14, 1997 letter.

On November 21, 1997, plaintiff served defendant with a first set of interrogatories and requests for production of documents, purusuant to Federal Rule of Civil Procedure 33 and 34. Plaintiff sought information and records pertaining to the 139 employees, discussed above, pertinent to this cause of action. See **Exhibit 11**: Interrogatories directed to Defendant and Plaintiff's Request for Production of Documents.

Defendant's response to plaintiff's discovery requests was due on December 21 1997. Nonetheless, on or before December 21, 1997, defendant did not respond to plaintiff's discovery requests.

Pursuant to the court's Scheduling Order, plaintiff wrote to Attorney Mayfield, on January 8, 1998, concerning defendant's failure to properly disclose information and defendant's failure to respond to plaintiff's discovery requests. See **Exhibit 12**.

On January 8, 1998, Attorney Mayfield, wrote to plaintiff stating:

> *". . . I dought (sic) that the postal service will be able to collect the information you requested until the later (sic) part of February. If you wish to extend the response time let me know. . . . If not, then file your motion to compel. . . . Quite frankly your little dispute is just one of file cabinent (sic) full of cases assigned to me and I will attend to your case as my time and schedule permits."* See **Exhibit 13**.

On February 4, 1998, Attorney Mayfield wrote to plaintiff, saying:

> *". . . I have been in contact with the Postal Service legal department on the status of . . . the information . . . you requested. This information is not readily available and has to be located from old files, some of which may be in storage or no longer available. . . . it is still my hope that some or all of the information and documents will be available before the end of the month."* See **Exhibit 14**.

On February 5, 1998, plaintiff filed a Motion to Compel defendant to properly disclose and respond to discovery requests. See **Exhibit 15**.

February 17, 1998: the court entered an order striking plaintiff's Motion to Compel and admonishing plaintiff for "*impertinent and scandalous assertions*." See **Exhibit 16**.

On February 27, 1998, Attorney Mayfield wrote to plaintiff stating:

> *"I have again been in contact with postal service legal department . . . It is anticipated that the responses will be sent next week. After my review and discussion with Mr. Probst will finalize them and forward them to you . . ."* See **Exhibit 17**.

In a telephone conversation, defendant's attorney told plaintiff "*If you don't have the information you need, then drop the case.*"

On March 6, 1998, more than 100 days after the due date for defendant's response, defendant responded to plaintiff's discovery requests. Defendant's responses were evasive, nonresponsive and/or incomplete, as follows:

1. Defendant did not provide the location of the documents or the names of the persons with custody of documents. See **Exhibit 18**.
2. Though Nancy Rodriquez, Labor Relations Specialist, signed the verification to the answers to interrogatories, defendant's answers fail to identify her or her department as the custodian of employee records. See **Exhibit 18**.
3. Defendant failed to provide any information concerning payroll records.
4. Defendant did not provide any home addresses or home telephone numbers, as requested. [See **Exhibit 18,** Interrogatories #2, 6, 7, 8, 9, 11, 12, 14]
5. Defendant did not explain the status of the individuals listed. See **Exhibit 18**.
6. Defendant's list of casual employees is incomplete. Defendant did not mention Kile Johnson, Mario

Hernadez, Thomas Coro and many other "Casuals" who worked at the facility during the period in question. The individuals defendant omitted support plaintiff's allegations. See **Exhibit 18** [answers to interrogatories #9 through 11]

7. Defendant did not provide any names of any employees or any other information about its regular employees in the flat sorter section, manual cases, during the period in question. Defendant simply disregarded plaintiff's requests for this information. See **Exhibit 18**.

Plaintiff wrote to the Court on March 18, 1998, explaining why the Motion to Compel was needed instead of a conference call.

The next day, March 19, 1998, upon receipt of plaintiff's March 18 letter, Attorney Mayfield, telephoned plaintiff. Attorney Mayfield was verbally abusive and threatened to force plaintiff to come to Phoenix, Arizona for a deposition, if plaintiff did not retract the March 18 letter. See **Exhibit 19**.

On April 1, 1998, defendant filed a Motion for Protective Order. The motion says:

> *Currently, defense attorney has information in his possession that has been requested. . . . The release of this personal information may violate the Privacy Act because it will contain the names and last known addresses of Postal Service employees. . . . Further, it is anticipated that there may be a need to release additional information which may likewise be protected under the Privacy Act during the course of this litigation.* See **Exhibit 20**.

Despite Attorney Mayfield's assurances that he "*has information in his possession that has been requested . . .*," Attorney Mayfield did not send plaintiff any of the information he claimed to have "*in his possession that has been requested.*"

On June 1, 1998, plaintiff wrote to Attorney Mayfiled, again requesting that defendant cooperate with discovery. See **Exhibit 21**.

On June 3, 1998, Attorney Mayfield responded to plaintiff's June 1, 1998 letter:

> *I question whether any of the detailed information regarding all of these individuals in any way relevant. . . . We have already advised you that some of the information you requested is simply no longer available. I am amazed at your allegations of wilful destruction of evidence, and your other veiled threats. . . . Rather than "shot gunning" your requests why can you not focus right now on a group of specific individuals that you perceive will "win your case" for you, give me their names, I will locate them and then you can schedule their depositions and we can get on with this matter.* See **Exhibit 22**.

On July 28, 1998, plaintiff wrote to defendant's attorney, stating:

> *I understand that it is not always easy for you to get all of the information that is required from your clients. Nevertheless, none of my discovery requests have been provided and the preparation of my case has been impeded. Would you kindly make one last appeal to the United States Postal Service, before our deadline for discovery expires.*
>
> *Kindly review your clients' responses to my discovery requests. . . . . Obviously, the list of employees is incomplete, since there is no mention of Kyle Johnson, Mario Hernandez, Thomas Coro and many other casuals who worked there during the period in question. . . . They did not have any difficulty giving me the clock rings for Jesus Garcia. . . . They did not provide the names or any other information about the regular employee. There*

> *is no mention of several individuals who were fired.* See **Exhibit 23**.

On July 31, 1998, Attorney Mayfield wrote to plaintiff, stating:

> *. . . I have sent a personal request to the Postal Service . . . to forward what ever information they presently have and to keep me updated on when they expect to provide me with further information. As of this date I have nothing further to forward to you. I appreciate your letter and I am doing all I can to provide either the information you have requested or an explanation as to why any information or documents are not available. . . .* See **Exhibit 24**

On August 13, 1998, defendant filed Supplemental Responses to Plaintiff's First Request for Production of Documents and First Set of Interrogatories. Attorney Mayfield informed plaintiff that defendant would not produce records of "casual employees" because defendant had already destroyed those records. Attorney Mayfield did not explain why defendant failed to provide any of the information requested about regular employees. See **Exhibit 25**.

On August 31, 1998 at 2:30 p.m., the Honorable Roslyn O. Silver, on plaintiff's request, held a telephone conference. Participating in the conference were Attorney Mayfield, Michael Propst, Esquire, Counsel for defendant's Law Department and the undersigned, Percy Hogan, Jr., pro se. See **Exhibit 26**.

Defendants' attorney, Mr. Mayfield, said:

> *"However, as of the time of plaintiff's first set of interrogatories [November 1997] and continuing to present date, it' not possible to provide a complete list, as the schedules for the flat sorters and manual operations no longer exist, due to a two-year routine retention/destruction period."* **See Exhibit 26**.

Plaintiff told the Court:

> *"Number two, if after I opened a grievance in 1994 in June, if after I made that grievance these records were not kept, there is a problem."* See **Exhibit 26**.

The Court:

> *"Well, if in fact the records were not kept because you filed a grievance, you have a point."* See **Exhibit 26**, page 6, lines 23-25 and page 7, lines 1-2

The Court to Attorney Mayfield:

> *"Am I to understand the records of the Postmaster are such that they can't determine at that time who was an employee, other than the names that Mr. Hogan has already provided?"* See **Exhibit 26**.

The Court ordered defendant to file affidavits:

> *". . . concerning his previous responses where he stated that records didn't exist. An affidavit must be provided as to why the records do not exist. And if he stated that a supplement will be coming, well, until the close of discovery, he has the obligation to provide the supplement. . . ."* See **Exhibit 26**, p.16

The Court ordered:

> *"The close of discovery will be October 2nd and the affidavit's due on September 14th. So you are to provide all the information that has been requested by interrogatory or otherwise by October 2nd."* See **Exhibit 26**.

On August 31, 1998, within an hour after the conference ended, Attorney Mayfield, telephoned plaintiff. He demanded, for the first time since plaintiff sued in 1996, that plaintiff travel from Pittsburgh, Pennsylvania to Phoenix, Arizona before September 22, 1998 for a deposition by him and Attorney Propst.

At no time during the conference held on August 31, 1998, did defendants request an extension of time to conduct new discovery. The Court did not authorize defendants to take plaintiff's deposition or extend the discovery deadline to allow for new discovery.

On or about September 8, 1998, defendants served plaintiff with a Notice of Deposition instructing plaintiff to appear in Phoenix, Arizona on September 22, 1998 for a deposition. See **Exhibit 27**.

On September 14, 1998, the court ordered both parties to respond to discovery requests.

On September 15, 1998, defendant filed Supplemental Responses to Plaintiff's First Request for Production of Documents. Defendant sent plaintiff "clock rings" for two "casual" employees, Thomas Coro and Mark Pacheco.

On September 15, 1998, Attorney Mayfield, served an affidavit from Nancy Rodriquez. The affidavit says:

> *The schedules are the key to determining who worked in a particular section or area during any specific time frame. There is no other listing of all the employees working within a section. Therefore, when I indicated the absence of schedules in response to Mr. Hogan's discovery requests, this means that there is no way to reconstruct from another source a complete listing of employees who worked in a particular section in the 1993-1995 time frame.* See **Exhibit 28** [Declaration of Nancy Rodriquez, dated September 15, 1998, page 3, paragraph 6]
>
> *As explained below, these are the schedules that are routinely deleted and destroyed every two years. There are no other complete listings of employees assigned to each pay location or section.* See **Exhibit 28** [Declaration of Nancy Rodriquez, dated September 15, 1998, lines 23-25]

With respect to current employees, Rodiquez' affidavit states:

> *If just a name is provided and that person worked for the postal service within the past 18 months, the name can be*

> *queried on the personnel computer system, and the social security number can be located. However, without a social security number of an individual, the specific clock rings cannot be located.* See **Exhibit 28** [page 4, lines 1-4 of Rodiquez' affidavit]
>
> *"In his letter of June 1, 1998 Mr. Hogan also supplied the names of three individuals, Kyle Johnson, Mario Hernandez and Thomas Coro. I contacted the Phoenix Finance Office and social security numbers were located for two of them." "During the process of preparing this affidavit, I retraced the steps previously taken and the documents in the file. I have found social security numbers of two additional casual employees, Thomas Coro and Marc Pacheco. I have requested the "clock rings" for these individuals and will forward that information if it is still available."* See **Exhibit 28** [Declaration of Nancy Rodiquez, page 6, line 1-9]

Though defendant's Administrative Support Manual (ASM) requires that defendant retain the schedules in question for at least three years, defendant admitted that it destroyed those records in two-years. Defendant destroyed those records one-year earlier than required by defendant's ASM. See **Exhibit 28** [Declaration of Nancy Rodiquez, Attachment A, page 2.

As of this date, defendant has not provided plaintiff with the following:

1. "Clock rings" for at least five casual employees who worked in the unit when plaintiff worked there,
2. records pertaining to two individuals who worked in the MAZE,
3. records pertaining to two others who did not work in the MAZE,
4. records pertaining to two individuals who left the employment because the work was too difficult,

5. records pertaining to a "Black" female, fired by defendant.
6. records pertaining to eight "casual" employees who predated plaintiff's group in the unit from June 1992 to June 1993,
7. records of eight "casual" employees who followed plaintiff's group in the unit from June 1994 to June 1995,
8. records concerning nineteen "regular" employees that worked from June 1993 to June 1994,
9. payroll records, as requested, pertaining to any employee, and
10. last known addresses or telephone numbers of any employee.

B. ARGUMENT

Federal Rule of Civil Procedure 37 provides:

> *For purposes of this subdivision, an evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond.*

Rule 37(c) of the Federal Rules of Civil Procedure provides:

> *(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failute is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. . . . these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule . . .*

A district court has the primary responsibility for selecting appropriate sanction for a party's failure to obey an order to permit discovery. Melendez v. Illinois Bell Telephone Co., 79 FRD 2d 661, rehearing denied (7th Cir. 1996)

A party's gross negligence and failure to attempt to comply in good faith with its discovery obligations may justify an adjudication of the case against it under the rule providing for sanctions for failure to make disclosure or cooperate in discovery. Martin v. Metropolitan Museum of Art, 158 FRD 289 (SDNY 1994)

On August 15, 1994, when plaintiff filed a complaint with defendant's EEO, defendant knew, or should have known, that it had to conduct a reasonable investigation of the facts before denying the allegations of plaintiff's complaint. Defendant is the repository of the only business records. Essential, to a reasonable investigation of the facts, are the identities and work records of plaintiff's supervisors and coworkers. Those records, showing the work history of employees, are vital to an understanding of the facts. Defendant should have sequestered all records pertinent to plaintiff's complaint, since those records constitute "material evidence" pertaining to a pending legal matter.

Exhausting the mandatory EEO administrative process guaranteed plaintiff, or reasonably should guaranteed, that defendant would retain all material evidence needed for a full and fair determination of plaintiff's allegations of racial discrimination. Defendant's EEO Investigator, Elaine Jones, was a federally-mandated investigator. It was not unreasonable for plaintiff, or for any other individual seeking legal redress, to assume that defendant's EEO operated in good faith and would conduct a reasonable investigation of the facts before rejecting plaintiff's complaint of racial discrimination. Defendant's EEO did not investigate the allegations of racism against defendant. Nor did defendant's EEO attempt to compare defendant's treatment of plaintiff with defendant's treatment of similarly situated coworkers of plaintiff.

After requesting, no less than three times, the names of similarly situated employees who were treated differently than plaintiff, Elaine Jones - the United States Postal Service EEO investigator, failed to make a comparison that would prove or disprove plaintiff's allegations of racial discrimination in the work place. Nevertheless, the EEO's Final Agency decision, dated February 7, 1996, states:

> *Record evidence discloses that the Complainant Failed to prove a Prima Facie case of discrimination based on race, when he [plaintiff] was unable to demonstrate that he had been treated differently than other comparative employees in a similar situation.*

After reviewing defendant's records, it is apparent that:

1. Defendant's EEO never investigated the issue of racial discrimination before dismissing plaintiff's complaint.
2. Defendant's EEO did not sequester pertinent records, before rejecting plaintiff's complaint of racial discrimination.
3. Defendant's EEO investigator never procured overtime records, or any other postal records, that would have aided in comparing plaintiff to his similarly situated colleagues.
4. Though the EEO investigation concluded that plaintiff worked 1041 overtime hours, no conclusion can be drawn from that fact because overtime hours worked by plaintiff's similarly situated casual and regular colleagues were never considered in the report. See **Exhibit 7** [Investigative Report, page N-16, lines 17-26]

Since plaintiff received that EEO Final Agency Decision, plaintiff has, through discovery procedures, tried in vain to gather the necessary comparative records to prove that defendant intentionally discriminated against plaintiff because of plaintiff's race. Without the full and good faith cooperation of defendant, in gathering this critical information, plaintiff will never be able to demonstrate that defendant intentionally discriminated against plaintiff because of plaintiff's race.

Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. In many cases, the only available avenue of proof is the use of statistics to uncover clandestine and covert discrimination by the employer. Statistics, showing an imbalance in overtime worked is probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination. See Teamsters v. United States, 431 U.S. 340 (1977)

Plaintiff sued defendant on May 16, 1996, almost two-years after plaintiff's initial EEO complaint of racial discrimination. After plaintiff sued, defendant still did not sequester records relative to plaintiff's complaint of racial discrimination. Instead, defendant says that it destroyed the means of obtaining pertinent records and documents that provided facts proving plaintiff's allegations. Then, defendant denied discriminating against plaintiff.

Defendants' Initial Disclosure was evasive and incomplete. Defendant continued its obdurate behavior, by not responding to plaintiff's discovery for more than 100 days. Then, defendant's responses were either evasive, incomplete or nonresponsive. Then, defendant ridiculed plaintiff for not having the information.

Obviously, the business records, pertaining to plaintiff's coworkers, are practically indisputable. Those records show that defendant forced plaintiff to work 400 hours more, in one year, than the similarly-situated employees defendant gave favorable recommendations for rehire.

Plaintiff requested records pertaining to, at least, 139 employees of defendant. This is the number of people plaintiff remembers working with. Defendant provided plaintiff with incomplete records pertaining to twelve "casual" employees. Defendant did not provide plaintiff with any of the "last known addresses" that Attorney Mayfield, represented to the court that he had in his possession. (See defendant's Motion for a Protective Order.) Defendant did not provide plaintiff with any records pertaining to "regular" employees, as requested by plaintiff. Defendant did not provide plaintiff with any records pertaining to "Christmas casual" employees, as requested by plaintiff.

On November 21, 1996, when plantiff served defendant with discovery requests, defendant had already destroyed all material evidence showing racial discrimination. Defendant destroyed those records after plaintiff sued defendant and before the court set a discovery schedule.

Defendant was involved in litigation with plaintiff for approximately eight months before defendant destroyed critical evidence pertaining to the lawsuit. Defendant has admitted that it destroyed evidence in January, February or March 1997. Defendant destroyed all evidence which proves that it discriminated against plaintiff. Defendant's failure to preserve documents resulted in gross prejudice to plaintiff. Defendant's concealment of requested information demonstrates a conscious and reckless disregard for discovery obligations. See Shaffer v. EWP Group, Inc., 169 FRD 19 (1996)

Those records were not only pertinent to plaintiff's allegations that defendant discriminated against plaintiff. They are equally pertinent to defendant's defense that defendant did not discriminate against plaintiff. Defendant cannot honestly assert a defense, without conducting a reasonable investigation of the facts to determine the truth of its defense.

Where relevant information is in possession or control of one party and is not provided, then an adverse inference may be drawn that such information would be harmful to the party who failed to provide it. Weeks v. ARA Services, 869 F.Supp. 194 (S.D.N.Y. 1994)

One can only infer from defendant's conduct that defendant destroyed the records to conceal the evidence of racial discrimination or that defendant raised its defense with a reckless disregard for the truth. Obviously, if the records were favorable to defendant's defense, defendant would not have destroyed the records. Obviously, defendant never investigated to determine whether it discriminated against plaintiff. If the defendant cannot determine who plaintiff's coworkers were, how can the defendant truthfully deny discriminating against plaintiff because of plaintiff's race. Defendant simply denied culpability without any fact basis for the denial.

Defendant's Administrative Support Manual (ASM) requires that the schedules in question be maintained for at least three years. Defendant has admitted to its covert and nonchalant destruction of evidence material to this lawsuit. The destruction of those records occurred one-year earlier than mandated by defendant's ASM for records to be kept in the ordinary course of business. Defendant destroyed those records one-year earlier than required by defendant's ASM. If defendant had complied with its own mandatory requirement, the pertinent records would have been available when plaintiff made his discovery requests.

Defendant has not offered a legitimate excuse for the premature destruction of material evidence. Defendant's reliance upon an unwritten so-called "two year retention/destruction policy" as its excuse for destroying material evidence subject to discovery in a federal lawsuit, is a "red herring." It is another attempt by defendant at deceiving the court. The facts show that it is not now, nor has it ever been, defendant's policy to destroy material evidence in a pending federal lawsuit. Defendant has not explained why it circumvented postal regulations to destroy material evidence in a pending lawsuit. The important question is, what happened to the requested documents, during the two years before defendant's so-called "two-year retention/destruction policy" excuse became effective. On August 15, 1994, just days after the incident, defendant knew of plaintiff's allegations of racial discrimination in the workplace - not yesterday. Defendant wants the court to believe that those documents were destroyed after two years because defendant did not know of the relevance of the documents. Clearly, defendant and defendant's EEO knew the importance of the documents.

A default judgement on the critical element of claim is a severe sanction for discovery violations. It will be granted only if defendant failed to comply with further discovery order and specific request for documents previously acknowledged to exist. Murphy v. Williams, 145 FRD 76 (ED Mich. 1992) In the instant lawsuit, defendant failed to comply with further discovery orders and specific requests for documents previously acknowledged to exist.

During the discovery hearing of August 31, 1998, the court ordered defendant to produce the names and records of "casuals" and "regular" employees. Defendant did not produce the name of any employee as ordered by the court. Defendant's excuse, for destroying material evidence has been couched in the rhetoric of a so-called "two-year retention-destruction policy" for schedules that are key to identifying and determining who worked in a particular area during any specific time period. Those records, however, should not have been destroyed because it is unlawful to destroy pertinent record evidence once a judicial process has commenced. "Wilful failure" to follow procedural requirement, sufficient to support default judgment as discovery sanction, is any intentional failure, and no wrongful intent need be shown. Kiely v. Shores Group, Inc., 160 FRD 159 (D. Kan. 1995)

Default judgement based on defendant's recurring obstruction of discovery procedures was appropriate sanction where defendant blatantly refused to provide court ordered discovery, destroyed discoverable evidence despite warnings, repeatedly attempted to relitigate points of law decided against them, and no lesser sanction would suffice to remedy prejudice to plaintiff. General Environmental Science Corp. v. Horsfall, 141 FRD 443, vacated 25 F3d 1048, 513 US 947 on subsequent appeal 53 F3rd 331 (1992)

While denying the existence of records after more than 2 years, defendants did provide four-year old records in its response to Interrogatory #8. Obviously, it has records of the regular employees that it deliberately failed to disclose. See **Exhibit 18**, [Answers to Interrogatories 4 and 5]

Attorney Mayfield has suggested to the court that, somehow, plaintiff is at fault for not having the evidence requested by plaintiff. In defendant's Response to Plaintiff's Motion to Amend, dated February 24, 2000, [page 4, line 6], Attorney Mayfield said: *"At no time, during the discovery phase, did plaintiff initiate any discovery."* Mr. Mayfield intentionally mislead the court.

Defendant's only strategy has been to obstruct justice. Defendant cannot explain why defendant had a so-called "marginal part-time employee [plaintiff] work more overtime hours - hundreds of hours more unsupervised hours - than any other "casual" or "regular" employee, in the history of the unit.

Attorney Mayfield admitted, in defendant's "*Motion for Privacy Act Protective Order*," filed on April 1, 1998, that "*the defendants have last known addresses of present and former U.S. Postal Service employees." "Currently, defense counsel has information in his possession that has been requested by the plaintiff during the course of discovery.*" See **Exhibit 20**, page 1, lines 23-24 and page 2, lines 5-6.

To date, over two-years later, Attorney Mayfield still has not provided any "*last known address*" to plaintiff. Attorney Mayfield's statement, in his *Motion for Privacy Act Protective*

Order, makes it abundantly clear that Assistant United States Attorney John Mayfield is withholding vital information. Can he be trusted, by the Court, not to be withholding other material evidence, either on his own or in collusion with United States Postal Counsel, Michael Propst? The rules are not different for United States Attorneys. Government lawyers can be sanctioned personally for failure to comply with discovery order. In re Williams. Bankruptcy, D.R.I. 188 BR 721, affirmed in part, vacated in part 215 BR 289 (1995)

An affidavit, submitted by Nancy Rodriquez, says that records were destroyed during the period January to March 1997. Defendant destroyed most of the evidence showing how it treated plaintiff's similarly situated coworkers. Clock rings and work schedules, showing overtime hours worked by the entire unit of 23 people, are irrefutable evidence of racial discrimination.

The proper remedy for uncooperative behavior during discovery is to move for judicial sanctions under rule governing failure to make or cooperate in discovery. Vogt v. Emerson Elect. Co., 805 F.Supp. 506 (M.D. Tenn 1992)

Plaintiff requests that the court deny defendant the use of any witness, fact or record in its possession that has been requested by plaintiff or that should have been disclosed in its initial disclosure or in a supplemental request had the facts been known.

Sanctions for discovery abuses are proper upon a finding of wilfullness and/or bad faith on the part of noncomplying party. Melendez v. Illinois Bell Telephone Co., 79 FRD 2d 661, rehearing denied (7th Cir. 1996)

WHEREFORE, plaintiff requests that the court:

A. Deny defendant the use of any witness, fact or record in its possession that has been requested by plaintiff or that should have been disclosed in its initial disclosure or in a supplemental request had the facts been known.

B. Plaintiff further requests that the court enter default judgement against defendant, based on defendant's recurring

1. obstruction of discovery,
2. refusal to provide court ordered discovery and
3. destruction of discoverable evidence.

Respectfully submitted,

S/____________________________
PERCY HOGAN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PERCY HOGAN,)
Plaintiff,) NO. CV 96-1189
) PHX ROS(WGY)
vs.)
MARVIN T. RUNYON, JR.)
Postmaster General,)
UNITED STATES POSTAL)
SERVICE and SIMON)**JURY TRIAL DEMANDED**
SIMON MOLINA, et al.)

AFFIDAVIT OF PERCY HOGAN, JR.

Before me, the undersigned, a Notary Public, personally appeared Percy Hogan, Jr., who, after being duly sworn according to law, swears that the statements made, in the foregoing Plaintiff's Motion in Limine and for Sanctions, are true and correct to the best of his personal knowledge, information and belief:

S/____________________________
PERCY HOGAN, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME, this __ _ day
of February, 1999.

____
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PERCY HOGAN,)NO. CV 96-1189
Plaintiff,)PHX ROS(WGY)
vs.)
MARVIN T. RUNYON, JR.)
Postmaster General,)
UNITED STATES POSTAL)
SERVICE and SIMON)**JURY TRIAL DEMANDED**
SIMON MOLINA, et al.)

CERTIFICATE OF SERVICE

This certifies that, on ____________, 2000, a true and correct copy of the within Motion in Limine and for Sanctions was mailed to the persons listed below, by First Class mail, postage prepaid, as follows:

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A complete duplicate copy of the above has been forwarded directly to the following:

Marie Bell, Deputy Clerk
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Clerk's Office, Suite 2300
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S/________________________________

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(412) 749-5388

NO. 00-16479

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PERCY HOGAN,
Appellant

vs.

MARVIN T. RUNYON, JR., Postmaster General,
UNITED STATES POSTAL SERVICE, SIMON MOLINA, et al.
Appellees

PETITION FOR REHEARING
and
PETITION FOR REHEARING EN BANC

Appeal from the order of the United States
District Court of Arizona, at No. CV 96-1189
PHX ROS(WGY), dated July 3, 2000,
entering summary judgment against Appellant, Percy Hogan.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERCY HOGAN, :
Appellant, :
APPEAL NO. 00-16479 :
vs. :
:
MARVIN T. RUNYON, JR., Postmaster :
General, et al. :
Appellees :

MOTION FOR PERMISSION TO EXCEED TYPE-VOLUME LIMITATIONS

Relying on Circuit Rule 32-2, I request that the Ninth Circuit Court of Appeals grant permission to exceed type-volume limitations set forth at Fed. R. App. P. 32(a)(7)(A)(B), on my Petition for Rehearing and or Rehearing en banc.

Because, in attempting to "direct the court's attention to one or more" of the points outlined in FRAP 40, I have gone way beyond the word limit allowed. As you will see, in my opinion (1) there were many, many facts overlooked or standards ignored, and many here not said. I beg the court to overlook this transgression on my part because (2) I have diligently tried to reduce the type-volume without compromising the points I need to convey. (3) This court is the court of last resort for me. After more than seven years, depending on how the court accepts this petition, I may not ever approach the bench again in this matter. For these reasons I request permission from the court to exceed type-volume limitations.

The rules allow "By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule" FRAP 32. It is in that spirit that I present my petition.

In the alternative, with the court's permission, accept my petition as being in substantial compliance pursuant to Circuit Rule 28-1. Here, I rely on FRAP 32-5. "If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, neither the optional reply brief nor any petition for rehearing need comply with FRAP 32.

Respectfully submitted,

S/

PERCY HOGAN, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERCY HOGAN, :
Appellant, :
APPEAL NO. 00-16479
vs. :
MARVIN T. RUNYON, JR., Postmaster :
General, et al. :

PENDING
Appellees :

SECOND MOTION FOR AN EXTENSION OF TIME TO FILE PETITION FOR REHEARING

1. The Clerk of Courts has granted me a one-week extension to file my Petition for Rehearing and Rehearing en banc.

2. Entry of judgment date was July 20, 2001. Federal Rules of Appellate Procedure 40 allows 45 days in which to file, counting from the entry of judgment date. That would have meant that my petition must be in the Clerk's Office no later than September 4, 2001. The Clerk's extension would mean that my petition must be in the Clerk's Office no later than September 10, 2001.

3. I, Percy Hogan, Jr., Plaintiff-Appellant in above-cited case, request that the Court grant a second extension of time of two additional weeks. This would mean that my petition would be in the Clerk's Office no later than September 24, 2001. I am a semi-trailer truck driver working an average of 60 hours per week and have been struggling Pro se in this litigation for the last seven years.

Try as I might, I have only one day a week that I can dedicate to research and writing my submissions.

Respectfully submitted,

S/

PERCY HOGAN, JR.

Statement of Counsel (Pro se) FRAP 40

This petition is made in hopes of directing the court's attention to various instances of abuse. In my modest judgment:

- many material points of fact and law were overlooked in the lower court's decision;
- there were also changes in the law that occurred while this case was in litigation which appear to have been overlooked by the panel; and
- also, in my opinion, there are apparent conflicts with other 9th circuit decisions.

A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact. See ***United States v. Washington***, 98 F.3d 1159, 1163 (9th Cir. 1996). I will attempt to point out lapses by the lower court in both (2) summary judgment decisions in this case.

Intentional Discrimination

The court filed its first order on February 11, 1999, and may not have been aware of the Supreme Court's decision in ***Kolstad***. See Order, ER, Vol. I, page 19. However, the landscape around when and what evidence is sufficient to present the punitive damages issue to the jury is now governed by ***Kolstad v. American Dental Association***, 119 S. Ct. 2118 (1999). In Kolstad an employer may be liable for punitive damages in any case where the employer "discriminates in the face of a perceived risk that its actions will violate federal law". Intentional discrimination, as in this case, is enough to establish punitive damages liability and may be presented to a jury. Supervisor Molina acted with malice, or at the least, he acted with a reckless indifference to the rights guaranteed me by Title VII.

Kindly review this punitive damages issue to determine whether any genuine issues of material fact exist and whether the district court correctly applied the relevant substantial law after Kolstad. My common law tort claims of slander, emotional distress, etc.[***] were also erroneously thrown out with the dismissal of my punitive damages claim.

The case record is full of instances where a jury could find evidence of intentional discrimination. However, "an inquiry into the adequacy of the evidence is improper when deciding whether to dismiss for failure to state a claim". See ***Companelli v. Bockroth***, 100 F.3d 1476, 1484 (9th Cir. 1996). In considering a motion to dismiss, the court must accept as true the plaintiff's allegations contained in the complaint and view them in the light most favorable to him. See ***Schemer v. Rhodes***, 416 U.S. 232, 235 (1974).

Government Agencies

"Government agencies cannot be assessed punitive damages for violations of Title VII". See order, ER, Vol. I, page 21, lines 24 and 25. However, in instant case, I have Title VII claims and also state law claims. The 9th Circuit has held, under similar circumstances, that compensatory damages allocated by the court to claims other than Title VII claims should not be subject to Title VII's cap. ***Pavon V. Swift Transportation Co.***, 192 F.3d 902, 910-11 (9th Cir. 1999). See also ***Passantino v. Johnson & Johnson Consumer Prod.***, 212 F.3d 493 (9th Cir. 2000), page

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[***] Right from the beginning and in every instance I have alleged that Supervisor Molina lied against me. Indeed this entire case is about slander. See ***Yamaguchi v. U.S.A.F.***, 109F.3d 1475 (9th Cir. 1997) at 22. See also ***EEOC v. Farmer Bros. Co.***, 31 F.3d 891, 899 (9th Cir. 1994).

510. In Pavon, the plaintiff recovered damages in excess of $300,000 on discrimination claims under state law, Title VII and §1981. I can find no relevant distinction between the Pavon case and my case. I have both Title VII claims and state law claims. The court, in striking my demand for punitive damages, erred also by ignoring my common law tort claims.

Ninth Circuit Conflict

What is most striking about Judge Roslyn O. Silver's order (ER, Vol. I, page 21, filed on 2/11/99) is the insistence that I (plaintiff) have a Title VII claim. After thoroughly reviewing the record of instant case and applying 9th Circuit standards, the court determined that (page 21, line 15) "Plaintiff's allegations are clearly sufficient to state a claim of illegal discrimination, ...". Also line 23, "Having determined that plaintiff has only a Title VII claim, ..." did Judge Silver's court err? Then why are the standards and the application of those standards so vastly different when seen through the eyes of Judge William G. Young? Judge Young's court did not see a Title VII claim after reviewing the same record. In fact, the Young court came to the exact opposite conclusion. In my modest opinion, consideration by the full court (en banc) is necessary to secure and maintain uniformity of its decisions.

Exceptions to the Exclusivity of Title VII

Judge Silver's order, ER, Vol. I, page 20, line 23 and page 21, line 18. Here the lower court is struggling to define the limited exceptions to the exclusivity of Title VII for federal employees who suffer "highly personal wrongs" by using words and phrases like rape, stalking the purported victims combined with harassing phone calls and defamatory remarks about the purported victim's sexuality, including fondling of the knees and breast plus kissing, combined with at least one incident of trapping the purported victim in a room after engaging in such conduct". Attempting to relate this to black men alleging illegal discriminatory practices in the workplace is quite a stretch for the lower court. A black man, as in my case, more than 6 feet tall and over 200 pounds, will rarely, if ever, be confronted with these kinds of incidents in the workplace. A black man will usually be victimized by more subtle, covert types of discriminatory practices that are equally as devastating as a woman being raped.

To maintain uniformity, the full court (en banc) should consider defining the limited exceptions, if any, to the exclusivity to Title VII for black men victimized in the workplace. In my opinion, this involves a question of exceptional importance where national uniformity is needed. See ***Faragher v. Boca Raton***, 524 U.S. at 787 N.1 (1998) ("although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards ...").

Time Off Requests

Judge Young's ***Memorandum and Order*** dated July 3, 2000.

Time Off Requests (ER, Vol. I, page, 37).

In determining that I (plaintiff) was not similarly situated with my Mexican coworkers, Judge Young's court erred in two ways. First, by spinning my deposition to mean that I knew and I admitted that the only way my Mexican co-workers got time off was because they asked for it. I (plaintiff) did not say that in my deposition (see deposition). This is a material point of fact that should not be overlooked because that one half, incomplete sentence, taken out of context, is being used to destroy a major part of my case.

Secondly, the court opined that because my Mexican colleagues requested time off and got it and I (plaintiff) did not request time off, I did not get time off. For this reason, no comparison can be made because this fact makes us dissimilar. The court concluded that my Mexican colleagues and I are not similarly situated and cannot be compared and that the USPS is entitled to summary judgment.

With all due respect, if the USPS's EEO does not do the job that Congress has mandated, how can my Title VII rights be protected? The USPS's EEO's only reason for being is to investigate, determine and maintain records that could prove or disprove Title VII claims. They know how to investigate allegations of racism but they did not in my case. Consequently, those records were not sequestered. I accuse the USPS's EEO's office, the agency which enforces Title VII, of intentionally not investigating to prove or disprove racism in this case because the EEO knows how to do it but they did not. The USPS is a state agency that enforces its own anti-discrimination laws through its EEOC. See ***EEOC v. Dinuba Med. Clinic,*** 222 F.3d 580 (9th Cir. 2000). See also 42 U.S.C. §2000e-5(e)(1)1994. See also ***EEOC v. Commercial Office Prods. Co.***, 486 U.S. 107, 110 (1988). Therefore, the USPS is responsible and default judgment is proper because they prevented me from having those incriminating documents.

Also, with all due respect, defendant and defense counsel concocted a scheme denying me those very same records. Defendant denied even having pertinent comparative records. Defendant counsel and Nancy Rodriguez swore in her affidavit of September 15, 1998, (ER, Vol. II, page 69) that the records in question had been routinely destroyed after only two years. If that is the case, then the USPS destroyed those records in spite of this pending judicial matter. Defendant wants the court to believe that the USPS has a policy of destroying pertinent documents when they know a judicial process is ongoing. The lower court completely overlooked or ignored this incredible statement.

In any event, (1) the USPS's EEO criminally refused to investigate and sequester pertinent records, (2) defendant counsel and Nancy Rodriguez swear that those same records were destroyed knowing a judicial process was ongoing, and (3) now Judge Young's court says even if we have the pertinent comparative records a comparison cannot be made because I am not "similarly situated" with any one of my co-workers. Something is wrong with this picture. In the name of all we hold sacred in this country, summary judgment is not fair because justice is not being served.

Not Similarly Situated

Second, the court erred in attempting to stretch Burgess as case law to back up its proposition that, all things being equal, a request for time off would render similarly situated colleagues dissimilar.

Burgess v. State of Washington, No. 98-35417, 1999 WL 974182, at *3 (9th Cir. Oct. 22, 1999)[****]. Burgess attempts to compare himself to numerous Caucasian permanent employees when he was only a probationary employee. The Burgess court correctly refused to ignore the distinction between probationary and permanent employees for the purpose of reviewing claims of disparate treatment. Indeed, all of the case law offered by the Burgess court seeks to compare probationary/temporary employees with regular/permanent employees. That is not what I am suggesting to the court, however, because that is not my case. Rather to compare casuals with casuals.

[****] 9th Cir. Court of Appeals may limit/restrict citation of this unpublished opinion. Burgess v. State of Washington.

Similarly Situated Standard

I respectfully suggest that the standard to be used in determining whether a fellow employee is similarly situated should be that determined in ***Lanear v. Safeway Grocery***, 843 F.2d 298 (8th Cir. 1998). See also ***Mazzella v. RCA Global Communications***, 642 F. Supp. 1531 (S.D.N.Y. 1986), aff'd, 814 F.2d 653 (2d Cir. 1987). The actual quotation from Lanear is "similarly situated in all relevant respects". Id at 301 (emphasis added) (quoting ***Smith v. Monsanto***, 770 F.2d 719, 723 (8th Cir. 1985), cert. denied, 475 U.S. 1050, 106 S. CT. 1273, 89 L. Ed. 2d 581 (1986)). Whether the Mexicans asked and I did not ask for time off is not relevant in instant case. The district court in ***Mazzella v. RCA***, attempted to provide some objective standards to measure the relevant aspects in determining whether a fellow employee is similarly situated: "Employees are not 'similarly situated' merely because their conduct might be analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the Plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the Plaintiff's, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it". Id at 1547. The record establishes the fact that my "similar situated" co-workers were (see ER, Vol. II, page 131):

1. Thomas Burch - Mexican
2. Jesus Garcia - Mexican

3. Marc Pacheco - Mexican
4. Mario Hernandez - Mexican
5. Thomas Coro - Cuban
6. Kyle Johnson - Black

Similarities included: (1) same supervisor — Simone Molina, (2) same job description — casual clerk, (3) hired the same day, (4) worked together in the same unit doing the exact same job — manual flat sorters, (5) exact same hourly wage — $7.50, (6) came to work at the same hour — 03:30 PM, (7) evaluated by the same standards, (8) were all used to help the Post Office "get the mail out" because the regulars were on strike (work slow down) — see affidavit of Wayne Rowe, ER, Vol. III, page 230, (9) were all fighting for a permanent job with the defendant USPS, and (10) were all subject to the same standards governing performance evaluation and discipline. Therefore, we were similarly situated in all relevant respects. The court attempts to make the argument for defendant but defendant has made no such argument or submitted any proof that would challenge these facts. I respectfully direct the court's attention to the facts and the law in the above situation because in my judgment the facts and the law have been misread by the lower court.

Consideration by the full court (en banc) may be necessary to secure or maintain uniformity of its decisions. It is clear that the 9th circuit needs some objective standards to measure the relevant aspects in determining whether a fellow employee is "similarly situated" because Burgess, with all due respect, as a guide to the lower court, apparently is not enough.

Severity and Pervasiveness of Hostile Work Environment

See ER, Vol. I, page 43.

I would like to direct the court's attention to ***Harris v. Forklift Sys., Inc.***, 510 U.S. 17, 23 (1993) ("whether an environment is 'hostile' or 'abusive' can only be determined by looking at all the circumstances"); see also ***Drake v. Minnesota Mining and Mfg. Co.***, 134 F.3d 878, 886 (7th Cir. 1998) ("Retaliation can take the form of a hostile work environment"); see also ***Oncale v. Sundowner Osffshore Servs. Inc.***, 523 U.S. 75, 80 (1998), page 1115 (concluding that actionable hostile work environment includes "general hostility to the presence of women (blacks) in the workplace"); see also ***Heyne v. Caruso***, 69 F.3d 1475, 1480 (9th Cir. 1995) (concluding that "conduct tending to demonstrate hostility towards a certain group" is relevant to show discrimination against an employee who is a member of that group).

Ratings need not be subaverage, however, to constitute retaliation. Rather, it is "undeserved performance ratings, if proven, that would constitute 'adverse employment decisions' " actionable under the retaliation provision of Title VII. ***Yartzoff***, 808 F.2d at 1376; in accord ***Brooks v. City of San Mateo***, No. 98-15818, -F.3d.-2000 WL 713748, at *7 (9th Cir. June 5, 2000).

As in ***Anderson v. Reno***, 190 F.3d 930 (9th Cir. 1999) my contention is that the lower court should have also considered my allegations under the "continuing violation doctrine" because those incidents represent ongoing unlawful employment practices that support my hostile work environment theory claim. All of my allegations beginning from the first week at Rio Salado are "like or reasonably related" enough to be considered under the "continuing violation doctrine". See ***Sosa v. Hiraoka***, 920 F.2d 1451, 1456 (9th Cir. 1990). See also ***Draper v. Coeur Rochester, Inc.***, 147 F.3d 1104, 1107 (9th Cir 1998).

The allegations contained in my initial EEO grievance and my allegations in this case are virtually identical. Compare Percy Hogan's "EEO Investigative Affidavit", dated 2/24/95, lower court docket No. 93, Vol. II, page 703, compared to complaint (ER, Vol. II, page 1, dated 2/24/95), Second Amended Complaint (ER, Vol. III, page 3 and 11) "Here, there is no dispute but that Hogan's Administrative Complaint contains every allegation he now presses in this matter". See Judge Young's order (ER, Vol. I, page 33, parag. 3).

Some of the following hostile work environment theory claims go to disparate treatment theory claims also.

My Supervisor Stalked Me

See ER, Vol. III, page 234, parag. 2, affidavit of veteran supervisor Albert Hansen.

1. "I had direct observations, contact and knowledge of Percy Hogan's work habits. This is because the first week that the casuals were hired for Rio Salado, Supervisor Molina, tour three, and myself would observe the casuals. During the first week Supervisor Molina stated to me that Percy Hogan needs to be watched and that he, Percy Hogan, would be trouble".

Supervisor Simone Molina, Mexican, was transferred to Rio Salado in May 1993, (see ER, Vol. III, page 157, 158, item C) as a supervisor trainee with virtually no supervisory powers and no experience in his new job. I, with the new group of casuals, arrived June 1, 1993, just weeks after Supervisor Molina. If a trier of fact believes veteran Supervisor Albert Hansen's affidavit, he might conclude that Supervisor Trainee Molina already had a bias against me the day I arrived. The fact is, from the moment I arrived at Rio Salado until my contract expired, Supervisor Molina stalked and harassed me whenever he felt he could get away with it without alerting my other three supervisors to his racist attitude.

2. After his 6 months as a trainee expired, Supervisor Molina was given partial control of our unit in October 1993. That is when the intimidation and direct harassment actually started and it progressively became more severe and pervasive. Supervisor Molina's first official act, after only 12 days as a supervisor, was to give Jesus Garcia, a Mexican casual who started at Rio Salado with me, a glowing recommendation for rehire (see ER, Vol. II, page 134), but to no one else in our group of seven. That, I think, indicates a bias for Mexicans like himself because this suggests that Molina is attempting to further Garcia's career without giving proper time for evaluation (see ER, Vol. III, page 241, parag. 3, affidavit of Barbara Hansen).

"When Supervisor Molina spoke with an Hispanic (Mexican) employee, male or female, he was more open and receptive to them. He also stood nearer them. He would also speak Spanish (Mexican) when giving directions or just chatting. When speaking to whites or blacks, he would keep his distance. You knew there was a difference between the races".

"I was disturbed and upset, as well as the rest of the section, when we learned what Supervisor Molina had written and ultimately done to Percy. We all felt he had been given a bad rap, and that Percy deserved better. We felt that Percy was being singled out".

"I am wring this affidavit in support of Percy Hogan. I strongly feel that he is a victim of racial discrimination".

Supervisor Molina used his Spanish/Mexican dialect to support, instruct and guide my Mexican colleagues, leaving me and Kyle Johnson, the only other black in the unit, out of the loop and at a huge disadvantage. In 1993-94 unemployment was high in the black community and higher for the Mexicans, so we were all fighting for a good job with the USPS. Molina's use of his Spanish/Mexican dialect was used to divide our group, thus creating a hostile working environment. After all, we all spoke American English. He also used it to cover up the advantages he gave to the Mexicans, like time off and assignment to the best jobs. That is the only reason why I mention the language.

Godwin v. Hunt Wesson, Inc., 150 F.3d 1217 (9th Cir. 1998) at parag. 16: "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial". "As we said in ***Lindahl***, it need be "very little", ***Lindahl v. Air France***, 930 F.2d 1434, 1438-39 (9th Cir. 1991).

As in my case, "the district court required Godwin to present substantial direct evidence of discrimination at the pretext stage. After reviewing our cases, we conclude that this ruling is incorrect for it conflates the standards we have articulated for two different types of evidence - circumstantial and direct — available at the pretext stage to prove discriminatory motive" Godwin.

Also, ***Sischo-Nowne***, ad, 934 F.2d at 1111 (when a plaintiff introduces "direct or circumstantial" evidence, "a factual question will almost always exist with respect to any claim of a nondiscriminatory reason".)

Also, ***Cordova v. State Farm Ins.***, 124 F.3d 1145, 1150 (9th Cir. 1997) . Citing Godwin "as the plaintiffs in Cordova and Lindahl, Godwin produced evidence of direct discrimination. See Cordova, 124 F.3d at 1150; Lindahl, 930 F.2d at 1438. She presented a statement made by Ruschman to Hunt Wesson's national sales manager, Bernie Stipetic, that Guthier "did not want to deal with another female after having dealt with Louise De Prefontaine". This comment directly suggests the existence of bias and no inference is necessary to find discriminatory animus. See Cordova, 124 F.3d at 1149; Davis, 14 F.3d at 1085.

"Those people make me sick"

See ER, Vol. III, page 230, parag. 4, 5 and 6, affidavit of Wayne T. Rowe.

"Do I believe that Percy Hogan was discriminated against? Yes, I do!!"

"Do I believe that Simone Molina is prejudiced against black people in general and Percy Hogan in particular? Yes, I do!!"

"In the two years that Simone Molina was my supervisor, I never heard Simone say anything nice about black people. When he spoke of blacks it was always negative. Case in point, one day an older black woman in our area named Joyce came upon a magazine in our area. I think it was *Time Magazine* and the cover story said "Oldest human skeleton found in Africa". Joyce started showing the magazine to everyone that passed by saying "See!! I always knew that Adam and Eve were Black!!!" When Supervisor Molina saw what was going on he became visually upset. Instead of confronting Joyce, he walked over to me. He asked me if I believed it was true. I told Simone I didn't know and that I didn't really care. It really wasn't an issue that I cared about. I noticed that Simone was shaking and upset. I suggested that he leave the area and calm down. He took my advice but as he turned to walk away I heard him say "those people make me sick".

"It is hard to say if this instance was the defining factor that led me to believe that Simone Molina is prejudiced against black people. It is likely an accumulation of comments and things that happened over the two years I worked for him".

The October Incident

See ER, Vol. II, page 3, parag. 14, complaint.

Yes, the October 1993 incident happened. During the first few days after Supervisor Simone Molina became a full-fledged floor supervisor, Simone brought me to his office, closed the door and started shouting at me. He ranted and raved saying that I was sabotaging his operation and that I was slowing down the crew to get more overtime. He shouted that if I did not straighten up he would fire me because now he had the power. It was truly frightening and had I reacted, I would have lost my job. This was the beginning of one of the most trying times of my life. He knew and I knew that there was no substance to his accusations. To this day, Molina has not denied this incident. He has, however, attempted to put a different spin on it. Humiliation, intimidation, and harassment were the order of the day. I did my best. I needed a job in the worst way to take care of my family. I did whatever it took. That intimidating tirade from Supervisor Molina put me on notice, that I would have to work harder and smarter than my co-workers and then pray, to keep my job. At any moment, with or without reason, Supervisor Molina could fire me with no questions asked. Molina goaded me, attempting to provoke me into doing something stupid. Supervisor Molina did the exact same thing to Kyle Johnson, the only other black under his partial supervision, on the exact same day. See lower court docket No. 93, Vol. II, page 773, affidavit of Kyle Johnson, dated September 8, 1994.

Severe Hostile Work Environment and Disparate Treatment

During my first months at Rio Salado, before Supervisor Molina took over, all of us casuals would be sent out of our unit to work wherever and whenever there was a problem. It seems that there was always a problem and one of the contributing factors was the ongoing strike (work slow down) by the regular employees. When Molina took over, however, things changed. See ER, Vol. III, page 230, parag. 2, affidavit of Wayne T. Rowe. From the entire group being sent out, it became Kyle Johnson and I, the two blacks in the unit. We were made to do the work that no one else wanted to do — over and over again, 7 or 8 times each night, night after night after night, creating a very hostile work environment. No one should have to go through what Kyle Johnson and I went through, especially working for our federal government even though we were "at will" temporary employees.

"After a while, it became apparent that when Supervisor Molina would come to move employees to another area, it would be Percy Hogan and Kyle Johnson. The Hispanic (Mexican) employees would always be the last to go and the first to come back to the section. I knew that as long as Percy and Kyle were there, I would never have to do the jobs that they had to do". Barbara Hansen's affidavit, ER, Vol. III, page 240, parag. 2.

"Percy Hogan was always at his work station. He always seemed to be there". See ER, Vol. III, page 234, parag. 4, veteran supervisor Al Hansen's affidavit.

"If based upon race, such disparate treatment and hostile work environment affecting the terms and conditions of employment is precisely the type of evil Title VII is designed to address". See Judge Young's-memorandum.

Clock Rings

The court, in my judgment, overlooked the uncontroverted evidence that the "clock rings" represent. The "clock rings" are the undisputed record that indicates the day and date an employee works, the time he clocks in and out, the number of payable hours, etc. ... The defendant USPS was gracious enough to give me, through discovery, just enough "clock rings" to establish the fact that I was forced by Supervisor Molina to work more overtime than any other employee, casual or regular, during my contracted time from June 1993 through June 1994. He always seemed to be there" (Al Hansen's affidavit). This fact also questions Supervisor Molina's justification for giving me a "marginal" evaluation on June 10, 1994, after the conclusion of my contract; while continuing to tell me to do an extraordinary amount of overtime and not my co-workers; also, supervisors had me train all casuals or regulars coming into the unit until the very day that my contract expired; the "clock rings" indicate that I was called from home and required to come to work even on my days off and the Mexicans were not. The "clock rings" indicate that I worked 400 hours more overtime than my nearest Mexican "similarly situated" co-worker. All of my Mexican co-workers were highly recommended for rehire, however, and subsequently rehired. I was considered marginal and not rehired. These "clock rings", uncontroverted, clearly indicate that a genuine issue of material fact exists regarding the severity and pervasiveness of the alleged conduct. These are the only documents given up by the defendant USPS in an unusually long and arduous discovery process and the lower court somehow overlooked or disregarded this evidence.

Continuing Violation Doctrine

In my humble opinion, the incidents cited above establish conduct on the part of defendant that a reasonable person would find objectively hostile, abusive and pervasive, and if scrutinized under the "continuing violation doctrine", Anderson v. Reno, would support my hostile work environment claim. Many of these incidents would also support my disparate treatment theory claim.

The Credibility of Witness Supervisor Molina

Encompassed within the Appeal Court's analysis must be a component that questions the veracity of the Federal government's only witness, Supervisor Molina. The lower court has made a tremendous leap of faith in supporting defendant's motion for summary judgment based only on that witness and my inexperience as an attorney. The lower court says (ER, Vol. I, page 63, line 9-11) "there is nothing objectively suspicious about a favorable recommendation being followed some five or six months later by a negative evaluation". There even the court is spinning out of control. That statement is exactly what the Federal government wants the court to believe — that my performance was negative between January 1994 and June 1994. Then why is it that we find Supervisor Molina (1) procuring my VRA application, (2) preparing my VRA application, (3) typing my 15-page application, and (4) submitting my application to Janice Boulden — all of this the week ending May 27, 1994. The question is, why did Supervisor Molina change his recommendation in one week (not six months) between the dates of May 27 and June 10, 1994, when he submitted the negative evaluation to personnel. Because up until May 27, 1994, there is not even a hint in the record that Supervisor Molina did anything other than support my candidacy for rehire.

In fact, defendant mentions this fact twice in defendant's "Brief of Appellee", page 9 and 44. "Such an inference is unreasonable and illogical especially since Hogan readily admits that Molina encouraged and personally assisted him in applying for the 'VRA career position' ".

See also affidavit of Barbara Hansen, ER, Vol. III, page 240-41. "There was a posting for Veterans for permanent jobs in the Post Office that Percy was qualified for. Everyone was sure that he would get a job. When discussing the position, Percy told me how Supervisor Molina helped him with the application and the general clerk, André Boulanger, was typing up the resume".

Proof of an Adverse Employment Action

See affidavits of veteran USPS Supervisor Albert Hansen, Barbara Hansen and Wayne T. Rowe., ER, Vol. III, page 233-242.

The fact that four people call Supervisor Molina a liar or a racist and a liar and also express "shock" at the negative performance evaluation of Percy Hogan is direct evidence that the "employment decision was based on a discriminatory criterion illegal under the Civil Rights Act", ***International Brotherhood of Teamsters v. United States***, 431 U.S. 324, 358 (1977), cited in ***Cordova v. State Farm Ins.***, 124 F.3d 1145, 1148-49 (9th Cir. 1997). This evidence "gives rise to an inference of unlawful discrimination", ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 253 (1981).

Another pertinent fact that seems to have been overlooked by the court is Janice L. Boulden's affidavit. Ms. Boulden, a Human Resources Specialist and Chief of the VRA Recruitment at the Rio Salado facility, stated in her affidavit that it was the full responsibility of the supervisors to make the determination on an employee's overall work performance as to whether they would recommend an employee or not for career conversion under the VRA provisions. Supervisor Molina did not recommend me for rehire; consequently, she could not process my application. There were no other factors taken into consideration. See ER, Vol. II, page 137, parag. 2. Also, lower court docket No. 93, Vol. III, page 724, complete affidavit of Janice L. Boulden.

These four affidavits, in my judgment, are enough evidence for the court to consider overturning its summary judgment decision because these affidavits question the motive, intent and veracity of defendant's only witness, Supervisor Simone Molina. In fact, Boulden's affidavit was written expressly to contradict and expose Molina's machinations in this case, a fact that has not been contested by defendant Post Office because she is a federal government employee.

USPS's Casual Recall List
See ER, Vol. I, page 57

There is no dispute as to whether Simone Molina's negative evaluation was the direct cause of Percy Hogan being dropped from the USPS's casual recall list, as the lower court suggests. The record evidence indicates and the USPS does not dispute the fact that, for a casual to be rehired, the casual must have a positive recommendation for rehire from his last supervisor. There is no need to reapply as casuals are put on a recall list and recalled when needed.

Also, there is no dispute as to whether Supervisor Simone Molina's negative evaluation was the direct cause that Percy Hogan's VRA application was not considered by Janice Boulden/Personnel to be processed; thus, directly and automatically hired as a career regular postal employee under the VRA provisions. Percy Hogan would have gone from casual, at will, temporary to a regular, full-time government employee with guarantees and benefits were it not for Supervisor Molina's malicious negative evaluation. This is exactly what Janice Boulden's affidavit says. See again lower court docket No. 93, Vol. II, page 724 (Boulden's full affidavit).

Supervisor Molina wanted these positions for Mexicans. Under Molina, I must have trained 20 people for his unit. They were all Mexican. Even when he fired Thomas Coro, Molina requested two Mexican women as replacement. See lower court docket No. 93, Vol. II, page 784, bottom.

There is no dispute, as the court suggests (order, ER, Vol. I, page 50) but that Molina's negative evaluation eliminated any chances of me ever working for defendant as a casual or a full-time employee ever again. These are two adverse actions not controverted by defendant. Adverse employment actions include "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees". ***Felder v. UAL Corp.***, 218 F.3d 973 (9th Cir. 2000) citing ***Wyatt v. Boston***, 35 F.3d 13, 15-16 (1st Cir. 1994).

Qualified for the Position

See Order ER, Vol. I, page 52, parag. 2.

"His proof founders, however, on the 'qualified for the position' requirement". My opinion is that the lower court overlooked or misunderstood pertinent facts like the following:

The mail carrier VRA position was uniquely similar to the mail sorting that I had done with great success for one whole year for the Post Office. The only difference was, instead of putting the mail into a Post Office hold-out box, I would be driving and putting the mail into someone's mailbox. This is not rocket science, as the lower court wants this court to believe.

I did not intend for the lower court to understand and analyze my qualifications for the VRA position. I think that analysis is jumping the gun. I never even got to apply. Had I applied, then USPS's personnel office would have evaluated my qualifications under VRA provisions as Janice Boulden indicated in her affidavit. I was qualified to apply, however, because all of my immediate supervisors, including Supervisor Molina, scrutinized the VRA requirements against my qualifications before they (supervisors) procured the applications for me only, and assisted in the preparation and submission of my 15-page application. Also, Ms. Boulden's affidavit should not be underestimated. An attorney, Ms. Boulden chose her words very carefully. However, even she admitted that I qualified for the position when she said, "No other factors were considered", and that she would have processed my application but for Supervisor Molina's negative recommendation for rehire. The lower court erred in overlooking her affidavit and choosing to give credence to Simone Molina, an admitted liar. Clearly, through Ms. Boulden's affidavit, she wanted to distance herself and protect the Rio Salado personnel office from this nefarious situation that Molina had created. The court can be assured that I had the complete support of my supervisors by reviewing the letters of recommendation for rehire by those supervisors. Those letters of support are all dated during the week ending May 27, 1994, which was the deadline for VRA applications. See lower court docket No. 93, Vol. II, page 749-52. The VRA program was just another attempt by the Congress to help Vietnam veterans with jobs. I was the only one of eight casuals under Supervisor Molina's direct supervision who was a veteran. The others could not apply. That is the nut of the problem. Supervisor Molina's false evaluation is the only reason why Janice Boulden did not process my application. She said so. Again, see affidavit of Janice Boulden, lower court docket No. 93, Vol. II, page 724. Janice Boulden had my application in hand. Following procedure, she requested a current recommendation for rehire from my last supervisor, Simone Molina, who did not recommend me for rehire. This was the first week in June 1994. A negative evaluation from

Supervisor Molina was totally unexpected. That is where the analysis and determination should be. My VRA application was his baby. I was not aware that a VRA program existed. It was our Supervisor Molina who brought to me and his other casuals the first copy of the VRA listing and put it on the bulletin board. After reading and talking and rereading, my whole group, including Supervisor Molina, realized that I was the only one in the group qualified to apply. No more standing in line or begging for a job or exams or being scared about some trumped up charges for your job because now one would have union protection. A whole host of possibilities open up when you work for the United States Government. We all wanted it and all one had to do was be qualified to fill out an application and apply. Looking back, that was a beautiful moment. It was just like the GI Bill, Congress was helping the Vietnam Vets. The fact that Supervisor Molina procured one application for me only and practically filled it out himself has not been disputed. The fact that he went above and beyond what is required of a USPS supervisor in this instance has not been disputed either. After all of the pertinent documents (drivers record, Honorable Discharge, etc.) had been collected, Supervisor Molina insisted that our timekeeper, Mr. André Boulanger, type my application so it could be professional. Supervisor Molina gave me a copy of his January 11, 1994, recommendation for rehire and told me to ask the other supervisors for a letter of recommendation for rehire in support of my VRA application. On May 27, 1994, my VRA application packet was sent to Janice Boulden. Nothing in the above paragraph has been disputed. Is it too much to suggest to the court that, after working a whole year in that unit, I was shocked and many of his colleagues were shocked to find out that less than one week later Supervisor Molina effectively killed my VRA application? My lack of qualifications to deliver mail did not block my application; Simone Molina's unjustified negative recommendation for rehire blocked my application. There is no doubt during the week ending May 27, 1994, during the preparation of my VRA application, that Supervisor Molina had no reservations concerning my qualifications for one of the hundreds of VRA positions. The court, in relying on Supervisor Molina's false affidavits, has abused its discretion.

Now the analysis should take us to the question of why he did it. Supervisor Molina has two affidavits on record as to why he did what he did and neither is believable.

Witness Molina's Two Affidavits

A reasonable person could believe that Supervisor Molina has a credibility problem. In both affidavits, he admits to lying to the government concerning my work performance in January of 1994.

In her affidavit, Janice Boulden called Supervisor Molina a liar. First, she said that Supervisor Molina was told not to send any applications to her for people that he did not recommend for rehire and yet on May 27, 1994, he sent my application to her. Second, Ms. Boulden said that Supervisor Molina has the full responsibility of deciding who would be hired. Supervisor Molina swore to this court in his affidavit that his job description does not include hiring and firing. Third, she said the only reason she did not process my application was because Molina did not recommend me. Molina wants to blame Janice Boulden and the USPS personnel for blocking my application.

Janice Boulden is an attorney and at that time controlled the VRA recruitment for defendant. If she calls Supervisor Molina a liar, then he has a problem. That fact alone is probative and should be enough to allow this case to proceed. How often do you get the personnel director calling a supervisor a liar concerning a material fact.

Beyond that, Supervisor Molina is an admitted liar. His own affidavit betrays him. In his affidavit he admits to lying to the federal government concerning the January 11, 1994, positive recommendation for rehire that he wrote for me. Supervisor Molina said that he told me in January 1994 that my performance was unacceptable so he could not recommend me for rehire. However, he wrote me a positive recommendation for rehire only because I assured him that I would change. He wants the court to believe that he did me a favor by lying to the Federal government. A reasonable person might not believe him. He also said in his affidavit that I persisted "too many times" and yet he did not fire me. Here he wants the court to believe that I disobeyed a supervisor's direct order "too many times" and yet he did not fire me. Unbelievable. Postal supervisors do not accept challenges or insubordination from "at will" casual help, especially after so many disgruntled employee problems. One hint of a problem and you are out. That is a reality that the court does not seem to be aware of. That Supervisor Molina fired Thomas Coro for not being able to work two more hours of overtime is a case in point and has not been disputed.

Janice Boulden swears to this court that Supervisor Molina is a liar. Molina admits that he lied to the government concerning my recommendation for rehire in January 1994. Three witnesses have sworn affidavits calling Supervisor Molina a liar or a racist and a liar. I have sworn that Supervisor Molina is a liar and a racist. These submissions, in my opinion, establish the fact that Supervisor Molina is a liar and a racist, and whatever he swears to, without further proof, is not to be believed. A reasonable person would demand more before believing Supervisor Molina's allegations. The lower court, however, is being unreasonable in allowing summary judgment based solely on Supervisor Molina's weak affidavit and my inexperience as an attorney. After seven years in litigation, the defendant has not produced a shred of evidence that reflects negatively on my work performance. The exact opposite is true.

Motion for Reconsideration

The fact that this court chose to believe an admitted liar over the evidence in the record and over me, sent me scrambling and expending resources that I do not have, in a mad attempt to find corroboration. Now that I was able to find four witnesses, alive and willing to testify after seven years, if the court does not include and review my motion to reconsider, it will all have been for naught.

If I may, I would like to remind the court that I am not a lawyer trying to be a truck driver. I am a truck driver struggling to do the best I can as a lawyer. In reading the case record, you have seen how slick, trained lawyers at the Attorney General's Office and the Postal Service's attorneys, have taken advantage of my innocence and inexperience. Maybe it's been fun to watch but is justice being served? I had no idea that my motion for reconsideration needed a separate notice of appeal. I looked upon it as an integral part of my whole case. I thought that my motion, along with my whole case record, would automatically be reviewed once I paid and filed my appeal with the higher appeals court.

The lower court, has never been more severe and mean spirited than in its decision in my case. Looking through recent 9th Circuit Court of Appeals' decisions, however, the circuit is in the vanguard in its sensitivity to and defense of laypersons, especially in Title VII claims. The court has commanded that because uncounselled laypersons, like me, often initiate employment discrimination complaints, Title VII's procedural requirements should be "neither interpreted too technically nor applied too mechanically". ***Ong,*** 642 F.2d at 318-19 (quoting ***Richardson***, 572 F.2d at 95-96).

It is not too late because a remedy could be a review of my entire case consistent with the command of the court.

The witnesses that were included on my "potential witness" list that I gave to defense counsel were the names of my co-workers that I could remember. Although I requested many times, defendant was afraid to give me any more names of my co-workers, nor the addresses and telephone numbers for the names that I could remember, although these individuals are still employees of defendant.

I knew that these co-workers knew what happened during my year with them, but I never knew exactly what these individuals would say to the court; nor did I realize how important they were until Judge Young's court basically called me a liar and believed my supervisor, and without witness corroboration in the form of affidavits or depositions, my case was lost. The lower court wants me to think like a highly skilled, trained officer of the court but I am not. I realize, however, that these are highly unusual circumstances and may be difficult for the court to understand, but these witnesses represent newly discovered evidence. There are ample grounds for the court to decide "excusable neglect" on my part. I also think now that many mistakes were made. I was also surprised by the court's rejection of my motion to reconsider after the court had clearly explained what I needed to proceed. In my opinion, these are extraordinary circumstances which would justify relief. See ***School Dist. No. 1J, Multnomah County v. Acands, Inc.***, 5 F.3d 1255, 1263 (9th Cir. 1993); ***Frederick S. Wyle Professional Corp. v. Texaco, Inc.***, 764 F.2d 604, 609 (9th Cir. 1985).

Further, "because the investors filed no notice of appeal related to the district court's denial of their motion for reconsideration, we do not review that order. As a practical matter, however, such limitation on the scope of the appeal makes no difference; since we review the grant of summary judgment de novo and would only review the denial of reconsideration for abuse of discretion, and since the two orders concern the same questions of whether the investment constituted a "security", de novo review of the summary judgment obviates any practical need for review of the order denying reconsideration", ***Kock v. Hankins***, 928 F. 2d 1471, 1475 (9th Cir. 1991).

I beg the court to review the lower court's memorandum and order granting summary judgment to defendant, including my motion to reconsider, because such a limitation on the scope of my appeal makes all the difference. Without the affidavits of the witnesses contained in my motion for reconsideration, my case is doomed. Alone, nobody believes me. The court in Kock found a way, within the law and the court's discretion, to make sure justice was done. This court will, too.

Since the two orders concern the same question, as in my case, de novo review of the summary judgement obviates any practical need for review of the order denying reconsideration. See Kock v. Hankins.

This is not my petition. This is only the part of the petition that is mandated in FRAP 40 "Statement of Counsel", introduction and purpose. The formal motion follows.

STATEMENT OF RELATED CASES

The undersigned is not aware of any related cases pending before this court.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the within Petition for Rehearing is proportionately spaced and contains 2,091 words and the Statement of Counsel has 8,771 words pursuant to Circuit Rule 28-1. The font is Times New Roman Regular 14 point in WordPerfect 8.

Percy Hogan, Jr., Pro se
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CERTIFICATE OF SERVICE

This certifies that, on September 21, 2001, a true and correct copy of the within Petition for Rehearing was mailed to the person listed below, by First Class mail, postage prepaid, as follows:

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PETITION FOR REHEARING
and
PETITION FOR REHEARING EN BANC

1. Percy Hogan respectfully petitions the Ninth Circuit Court of Appeals for a rehearing and/or for a rehearing en banc of the decision of this court, dated July 20, 2001. The panel decision conflicts with the decisions of the United States Supreme Court and of the Ninth Circuit Court of Appeals. See e.g., ***Brown v. General Services Administration***, 425 U.S. 820, 96 S.Ct. 1961 (1976); ***Furnco Construction Co. v. Waters***, 438 U.S. 567 (1978); ***International Brotherhood of Teamsters v. United States***, 431 U.S. 324,325 (1977); ***Kolstad v. American Dental Association***, 119 S.Ct.2118 (1999); ***McDonnell-Douglas v. Green***, 411 U.S.792 (1973); ***Reeves v. Sanderson Plumbing Products, Inc.***, 120 S.Ct. 2097, at 2108 (2000); ***Teamsters v. United States***, 431 U.S. 340 (1977); ***Texas Department of Community Affairs v. Burdine***, 101 S.Ct. 1089, 450 U.S. 248, 67 L.Ed.2d. 207 (1981); ***United States Postal Service Board of Governors v. Aikens***, 460 U.S. 711 (1983); ***Brazil v. United States Department of Navy***, 66 F.3rd 193, 197 (9th Cir. 1995); ***Brock v. United States***, 64 F.3d 1421, 1423 (9th Cir. 1995); ***Chuang v. University of California***, 225 Fd. 3rd 1115 (9th Cir. 2000); ***Fielder v. UAL Corp.***, 218 F 3rd 973 (9th Cir. 2000); ***Gilbrook v. City of Westminister***, 177 F. 3rd 839, 847-848 (9th Cir. 1999); ***Kortan v. California Youth Authority***, 217 F.3rd 1104 (9th Cir.2000); ***Morgan v. National Railroad Passenger Corp.***, 232 F3rd. 1008 (9th Cir. 2000); ***Passantino v. Johnson & Johnson Consumer Products***, 212 F.3rd 493 (9th Cir. 2000); ***Yartzoff v. Thomas,*** 809 F.2d 1371 (9th Cir. 1987);

2. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

3. This court is required to review a district court's agrant or denial of a motion for summary judgment de novo. See ***Morgan v. National Railroad Passenger Corp.***, 232 F.3rd 1008 (9th Cir. 2000).

4. A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact. See ***United States v. Washington***, 98 F. 3rd. 1159 (9th Cir 1996).

5. Viewing the evidence in the light most favorable to Percy Hogan, the evidence is quite sufficient to defeat a motion for summary judgment. This court upheld the lower court's entry of summary judgment only after independently weighing the evidence favorable to Postal Service against other evidence and concluding that this evidence was such as to support a finding in favor of the Postal Service. The court's approach was error. This court relied impermissibly on inferences in Postal Service's favor. See ***Gilbrook v. City of Westminister***, 177 F. 3rd 839, 847-848 (9th Cir. 1999).

6. The court has a limited role when deciding a motion for summary judgment. That there is evidence which oppose Percy Hogan's evidence which the judge looked upon more favorably is simply not relevant to a motion for summary judgment, since the fact finder is free to disbelieve and, therefore, disregard that evidence at the trial.

7. More specifically; in entertaining a motion for summary judgment as a matter of law, the court must draw all reasonable inferences in favor of the nonmoving party. It may not make credibility determinations or weigh the evidence. This court erred by drawing a number of inferences and making credibility determinations in the Postal Service's favor.

8. Percy Hogan established a prima facie case. Percy Hogan is an African-American citizen of the United States. Percy Hogan was

qualified for the position. Percy Hogan was treated less favorably than similarly situated white and Mexican employees.

9. The clock rings, showing the overtime hours worked by the entire unit of 23 employees, are irrefutable evidence in favor of Percy Hogan. In an 11-month period as a "casual employee" at the Rio Salado work site, Percy Hogan worked 321 continuous days of 10 to 2 hour shifts. Percy Hogan was off 9 days out of 330 working days. Percy Hogan worked 3,120 hours, during the year (1041 overtime and 2079 regular hours).

10. The issue of hours-worked is straight forward. The Postal Service is in the business of distributing mail to the public. If the Postal Service is behind in the distribution of mail, it only makes sense that it would call in its best workers to work overtime. This is the most efficient use of its resources.

11. Percy Hogan worked more overtime hours than any "regular" in the unit. Percy Hogan worked, at least, 400 hours more overtime than any similarly situated Hispanic or white "casual" worker.

13. The fact that Postal Service chose Percy Hogan over all other workers infers that Percy Hogan was the best employee in the unit. Otherwise, Postal Service would have called other employees in to work overtime and not Percy Hogan.

14. These facts, showing an imbalance in overtime worked, are probative in this case, because such imbalance is often a telltale sign of purposeful discrimination. See ***Teamsters v. United States***, 431 U.S. 340 (1977).

15. Percy Hogan's facts are supported by the record before the court. They are not mere allegations, conclusory statements, assertions of belief or inadmissible hearsay. Percy Hogan's facts are legally sufficient to raise a genuine dispute on various questions of material fact, which give rise to an inference of unlawful employment discrimination. See ***McDonnell-Douglas v.***

Green. See also ***Texas Department of Community Affairs v. Burdine***, supra at 1094.

16. After Percy Hogan presented his prima facie case, the burden shifted to Postal Service *"to articulate some legitimate, nondiscriminatory reason for the employee's rejection."* Id., at 802, 93 S.Ct. at 1824; *Texas Department Of Community Affairs v. Burdine*, supra at 1095.

17. However, in addressing their Stage II burden, Postal Service did nothing to dispel the adverse inference raised by Percy Hogan's prima facie case. Postal Services did not explain why it always called Percy Hogan to work overtime over other similarly situation white and Hispanic workers, while stating that it considered Percy Hogan to be a "marginal employee."

18. Instead of addressing its Stage II burden, Postal Service destroyed or concealed crucial evidence and then argued conclusions that those records would contradict. This prompted Percy Hogan to move for judicial sanctions, under Federal Rule of Civil Procedure 37, governing the failure to make or cooperate in discovery. See e.g. ***Vogt v. Emerson Elect. Co.***, 805 F.Supp. 506 (M.D. Tenn 1992).

19. It appears that this court selectively addressed issues, by singling out those facts which can be misconstrued against Percy Hogan. This court fails to even address the issue of Postal Service's concealment and destruction of records.

20. The facts of record show that Postal Service's Administrative Support Manual (ASM) requires that the schedules in question be maintained for at least three years. Postal Service destroyed that evidence, after Percy Hogan sued and one-year earlier than authorized by its own regulations, as set forth in its ASM..

21. Where relevant information is in possession or control of one party and is not provided, then an adverse inference may be drawn that such information would be harmful to the party who failed to

provide it. ***Weeks v. ARA Services***, 869 F.Supp. 194 (S.D.N.Y. 1994).

22. One can only infer from Postal Service's conduct that Postal Service destroyed the records to conceal the evidence of racial discrimination and that Postal Service raised its defense with a reckless disregard for the truth.

23. Postal Service's concealment of evidence demonstrates a conscious and reckless disregard for discovery obligations. See ***Shaffer v. EWP Group, Inc.***, 169 FRD 19 (1996).

24. Postal Service's failure to preserve that evidence resulted in gross prejudice to plaintiff. The "wilful failure" to follow procedural requirement, sufficient to support default judgment as discovery sanction, is any intentional failure, and no wrongful intent need be shown. ***Kiely v. Shores Group, Inc.***, 160 FRD 159 (D. Kan. 1995).

25. Sanctions for discovery abuses are proper upon a finding of wilfulness and/or bad faith on the part of noncomplying party. ***Melendez v. Illinois Bell Telephone Co.***, 79 FRD 2d 661, rehearing denied (7th Cir. 1996). Default judgement based on Postal Service's recurring obstruction of discovery procedures is an appropriate sanction. No lesser sanction would suffice to remedy the prejudice to plaintiff. ***General Environmental Science Corp. v. Horsfall***, 141 FRD 443, vacated 25 F3d 1048, 513 US 947 on subsequent appeal 53 F3rd 331 (1992).

26. This court should have granted a default judgement in favor of Percy Hogan on the critical element of claim, because Postal Service failed to comply with a subsequent discovery order and specific requests for documents previously acknowledged to exist. ***Murphy v. Williams***, 145 FRD 76 (ED Mich. 1992).

27. The lower court gave great leeway and excused many lapses by Postal Service and its counsel. The rules are not different for United States Attorneys. Government lawyers can be sanctioned personally for failure to comply with discovery order. ***In re***

Williams. Bankruptcy, D.R.I. 188 BR 721, affirmed in part, vacated in part 215 BR 289 (1995).

28. The court should not have resolved factual disputes, by disregarding the adverse inference from Postal Service's concealment and destruction of evidence. Rather, the court is to grant the motion for summary judgment only if the undisputed facts and the reasonable inferences drawn therefrom, when viewed in the light most favorable to the party opposing the motion support, ***Koropoulos v. Credit Bureau, Inc.***, 734 F2nd 37 (1984).

29. Postal Service did not present sufficient facts to "frame the factual issue." Postal Service presented mere allegations, conclusory statements, assertions of belief and inadmissible hearsay. There are no facts in the record which supports any statement Postal Service made in support of its evaluation of Percy Hogan's work performance. Postal Service's articulation of legal conclusions, rather than setting forth facts upon which such conclusions are based, does not meet the requirements of Rule 56(e). ***Wire Mesh Products, Inc. vs. Wire Belting Association***, 520 F. Supp. 1004 (E.D. Pa).

30. In ***Yartzoff v. Thomas***, 809 F.2d 1371 (9th Cir. 1987), this court held that a negative job evaluation violates Title VII, even if it does not affect a decision not to hire the victim. Transfers of job duties and undeserved performances ratings, if proven, would constitute adverse employment decision cognizable under Title VII.. ***Supra*** at 376 34. See also ***Kortan v. California Youth Authority***, 217 F.3rd 1104 (9th Cir. 2000).

31. Because Postal Service did not cure, but effectively ratified Molina's falsehoods, it is clear that Percy Hogan presented sufficient evidence to defeat a motion for summary judgment. Proven undeserved performance ratings constitute adverse employment decisions.

32. For example, Percy Hogan applied for a position through the VRA program. Percy Hogan, a Vietnam veteran, was the only

person in Percy Hogan's unit who met all requirements for the VRA program. Postal Service advised supervisors not to submit any application for those employees not recommended for rehire. Supervisor Molina encouraged and assisted Percy Hogan in applying for the position. Supervisor Molina then presented false evaluations of Percy Hogan to prevent Percy Hogan from getting the position.

33. Subsequently, Percy Hogan learned that Supervisor Molina submitted a false evaluation of Percy Hogan's work performance. Supervisor Molina falsely wrote that Percy Hogan's work performance was marginal, that he required constant supervision, left his work station without authorization and was constantly distracted from his appointed duties. Supervisor Molina's false evaluation was the reason Postal Service refused to rehire or consider Percy Hogan for the VRA program.

34. If Supervisor Molina believed that Percy Hogan was not qualified for the position, why did Supervisor Molina:

a. encouraged Percy Hogan to submit Supervisor Molina's positive recommendation, dated January 11, 1994, with his application;

b. drive 4-miles from the Rio Salada facility to get an application for Percy Hogan;

c. drive back a second time to get forms needed as attachments to the application;

d. advise and assist Percy Hogan in preparing the VRA application;

e. check Percy Hogan's driving record, to make sure there would be no problem;

f. tell the time-keeper, Andre Bonlargor, to type Percy Hogan's application for the VRA program so that it would be more professional;

g. review the VRA application, making sure that Percy Hogan prepared it properly;

h. tell Percy Hogan, again, to submit Supervisor Molina's positive [the January 11, 1994] recommendation for rehire.

35. Supervisor Molina now swears, under oath, that he based his negative evaluation of Percy Hogan's work on information which he had already said he did not consider adequate. In support thereof, Supervisor Molina filed an affidavit of "Laura Ledesma."

36. Postal Service suggests that six years after the incident occurred, Laura Ledesma recalls that, in July or August 1993, Percy Hogan said something she did not quite understand but which she "interpreted" as a suggestion that she could get more overtime by "milking the clock."

37. Supervisor Molina's latest version of the incident contradicts statements he made before Percy Hogan sued Postal Service. At that time, Supervisor Molina said that Ledesma's alleged conversation with Percy Hogan was insufficient.

a. Supervisor Molina's original affidavit failed to mention the October incident as a factor in his evaluation of Percy Hogan's work performance.

b. Laura Ledesma's ability to remember Percy Hogan at all, after six years, is suspicious. For her to remember such minute detail, such as noticing Percy Hogan being away from his assigned work station when he was not scheduled for a break; is questionable.

c. Ledesma left the employ of postal Service in August 1993. It was not until late October or early November when Supervisor Molina confronted Percy Hogan about what Ledesma supposedly said.

38. In an affidavit, Supervisor Molina relates another hearsay statement supposedly made by one Luz Gonzales, while admitting that the information is nothing more than "one involving one employee's word against the other. . ." Postal Service failed to even introduce an affidavit from Luz Gonzalez.

39. Postal Service did not interview any of the employees with whom Percy Hogan worked or document the work that was being produced by the unit to see if there was any evidence of a work slow down. In other words, Postal Service did not present any facts to support its conclusory allegations.

40. Supervisor Molina must not have believed that Percy Hogan was engaged in any behavior which was detrimental to the work output. Otherwise, he would have been required to take action. Supervisor Molina would have fired Percy Hogan, just like he fired Thomas Coro. Instead, he continued to select Percy Hogan over all other employees to work overtime when Postal Service got behind in distributing the mail. If Supervisor Molina truly believed that Percy Hogan "milked the clock," why would Supervisor Molina require Percy Hogan to work overtime and not call other workers whom Supervisor Molina now says he considered superior workers?

41. Postal Service's pretextual explanations themselves could appropriately be considered as affirmative evidence of the Postal Service's motivation in rejecting Percy Hogan's application. As the Supreme Court recently held: *"Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt."* ***Reeves v. Sanderson Plumbing Products, Inc.***, 120 S.Ct. 2097, at 2108 (2000).

42. Not only did the court decline to recognize the effect of Molina's tainted evaluation on Hogan, it also failed to discuss its effect on Hogan's ability to resume working in the future.

43. It is not the province of a court to spin such evidence in an employer's favor when evaluating its motion for summary judgment as a matter of law. See e.g. *Chuang v. University of California*, 225 Fd. 3rd 1115, 1129 (fn 5)(9th Cir. 2000).

44. Moreover, there is substantial other evidence from which a jury could conclude that Supervisor Molina's falsified evaluation of Percy Hogan was motivated by racial animosity.

45. The disparity in time off, with Supervisor Molina giving Mexican workers preferential treatment over black workers was but one of the claims Percy Hogan presented to the lower court.

46. The record shows a disparity in work assignments, with black employees being assigned the tasks no one else in the unit wanted to do or assignments which were dangerous. The other casuals would remain at their normal work stations, with headsets on listening to music. When Percy Hogan or Kyle Johnson returned to the unit, Supervisor Molina would make them stay in the unit for overtime, to finish getting out the mail. Postal Service failed to articulate some legitimate, nondiscriminatory reason for the disparity in treatment. ***McDonnell-Douglas v. Green and Texas Department of Community Affairs v. Burdine***, supra.

47. Postal Service does not explain why Supervisor Molina was always rude toward Percy Hogan, while spending considerable time chatting in Spanish with the Mexican workers.

48. Postal Service does not give a legitimate, nondiscriminatory reason for the disparity in the way Supervisor Molina evaluated employees in the unit, by overlooking the objective data which shows Percy Hogan to be, by far, the best employee in the unit, but using subjective criteria which has no basis in fact, to conclude that Percy Hogan is a marginal employee while less productive Mexican workers received positive evaluations.

49. Postal Service does not explain why Percy Hogan's similarly situated coworker, Jesus Garcia, who did not pass the postal test, received a glowing recommendation for Garcia's rehire from

Supervisor Molina, twelve days after Molina became supervisor of the unit. [Note: Percy Hogan passed the postal test.]

50. Clearly, the lower court abused its discretion in determining that Percy Hogan was not "similarly situated" with other casual employees. See ***McKenna v. Weinberger***, 234 U.S. App. D.C. 297, 729 F2d 783 (D.C. Cir 1984) (female probationary employee not similarly situated to male permanent employee); ***Walker v. Runyon***, 979 Fsupp 1363, 1368 (D.Kan 1997) (black probationary employee not similarly situated to a white employee who was never on probation during plaintiff s tenure); ***Williams v. Cuomo***, 961 FSupp 1241, 1245 (N.D. Ill 1997) (where black male was the only probationary employee, there were no similarly situated employees.)

51. These other "non-black" employees reported to the same supervisor as Percy Hogan, they were subject to the same standards governing performance evaluation and discipline, and they engaged in conduct similar to the plaintiffs, without any differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it. See **Mazzella v. RCA Global Communications**, 642 Fsupp 1531 (S.D. N.Y. 1986), affirmed 814 F2d 653 (2nd Cir. 1987).

52. Though Postal Service offered no explanation for this disparity in treatment, this court concluded that Postal Service did not engage in racial discrimination, while overlooking Postal Service's failure to articulate the "legitimate, non-discriminatory reason" required by law to rebut the inference of unlawful employment discrimination because of race. This court had no basis in law or fact for entering summary judgment against Percy Hogan.

53. If the employer's actions remained unexplained, it is more likely than not that such actions were based on a discriminatory criteria illegal under the act. ***Furnco Construction Co. v. Waters***, 438 U. S. 567 (1978); ***Texas Department of community Affairs v. Burdine***, supra at 1094.

54. Since Postal Service is silent in the face of the presumption created by Percy Hogan's prima facie case, the court should have entered judgment for the Percy Hogan because no issues of fact remain in the case. ***Texas Department of Community Affairs v. Burdine***, at 1094.

55. These facts are sufficiently probative to dispel any attempts to misconstrue the facts as meaning anything other than the fact that Percy Hogan was well qualified and had been recommended for the VRA position by all three supervisors, Al Hanson, John Camu [on May 26 and May 27, 1994] and Simon Molina.

56. The court's conclusion depended upon the court's improper usurpation of the jury's basic fact finding authority, including the authority to draw inferences from the facts established and to believe some witnesses but not others.

57. Courts should only allow summary judgment where the movant has complied with Rule 56(e), by affirmatively demonstrating the absence of any genuine issue of material fact showing the law to be in his favor. ***Securities and Exchange Commission vs. Spence & Green Chemical Co.***, 612 F.2d. 896 (1980). See also ***Spirides vs. Reinhardt***, 613 F.2d. 826 (App. DC 1979).

58. An application of Kolstad's intentional discrimination requirement to the facts here leaves no doubt that punitive damages were available. There is substantial evidence based upon which a jury could find malice or reckless indifference to Hogan's federally protected rights. See e.g. ***Passantino v. Johnson & Johnson Consumer Products***, 212 F.3rd 493 (9th Cir. 2000).

59. The standard for determining when evidence is sufficient to present the punitive damages issue to the jury is now governed by ***Kolstad v. American Dental Association***, 119 S.Ct. 2118 (1999). The court stated that an employer may be liable for punitive damages in any case where it "discriminate[s] in the face of a perceived risk that its actions will violate federal law." Id at 2125.

The court made clear that although egregious conduct could be evidence of evil intent, such conduct was not required to establish punitive damage liability. Id at 2126. Thus, in general, intentional discrimination is enough to establish punitive damages liability.

60. The record shows that Supervisor Molina subjected Percy Hogan to acts of intimidation and the threat of losing his job. Molina falsely accused Percy Hogan and another black employee, Kyle Johnson, of wrongdoing. Molina was always rude toward Percy Hogan. Molina threatened to ruin Percy Hogan's career, for no reason. A supervisor, Lou Gonzalez, threatened to have an unidentified female falsely accuse Percy Hogan of sexual misconduct, if he did not withdraw his EEO complaint.

61. Supervisor Molina routinely gave Percy Hogan's Mexican coworkers 2 days off every week. He always gave the Mexican workers the best days off (Saturday and Sunday). Sometimes, Supervisor Molina gave the Mexican employees more than 2 days off per week. On Percy Hogan's days off, Supervisor Molina would call Percy Hogan at home and require that he come to work. Supervisor Molina did not require Mexican employees to come to work on their scheduled days off.

62. Percy Hogan said, during his deposition, that he never asked for time off. He never said that he knew exactly how the Mexican workers got time off. Nonetheless, the lower court distorted Percy Hogan's deposition testimony to mean that the only way the Mexican workers got time off was because they asked. Thus, the lower court concluded that since Percy Hogan did not ask for time off, Percy Hogan was not similarly situated.

63. The lower court held that Percy Hogan is not entitled to punitive damages. In denying this claim, the court relied upon **Brown v. General Services Administration**, 425 U.S. 820,96 S.Ct. 1961 (1976); ***Brock v. United States***, 64 F.3d 1421, 1423 (9th Cir. 1995); ***Brazil v. United States Department of Navy***, 66 F.3rd 193, 197 (9th Cir. 1995) to support its conclusion that

Postal Service's *"wrongs [were not] sufficiently egregious."* Obviously, the lower court did not have racial discrimination in mind when it discussed "egregiousness." A black man, experiencing racial discrimination in the work place, rarely has to deal with "kissing" or "fondling".

64. A hostile working environment occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment. *Morgan v. National Railroad Passenger Corp.*, 232 F3rd, 1008 (9th Cir.2000).

65. Most instances of hostile environments are not capable of facile identification. Instead, the day to day harassment of particularly significant, both as a legal and a practical matter, in its cumulative effect. ***Fielder v. UAL Corp.***, 218 F. 3rd 973 (9th Cir. 2000).

WHEREFORE, Percy Hogan requests that the Court of Appeals for the Ninth Circuit reinstate Simon Molina, as a defendant in this cause of action; reverse the lower court's order entering summary judgment against Percy Hogan; reinstate Percy Hogan's claim for punitive damage against Postal Service and Supervisor Molina; enter judgement against Postal Service and Supervisor Molina as a sanction; and remand this lawsuit to the district court for a trial on the issue of the amount of liability.

Respectfully Submitted

S/____________________

Percy Hogan, Jr., Pro se
302 Farren Street
Sewickley, PA 15143
412-749-5388

STATEMENT OF UNRELATED CASES

The undersigned is not aware of any related cases pending before this court.

S/
Percy Hogan, Jr., Pro se
302 Farren Street
Sewickley, PA 15143
412-749-5388

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the within Petition for Rehearing is proportionately spaced and contains 2,091 words and the Statement of Counsel has 8,771 words pursuant to Circuit Rule 28-1. The font is Times New Roman Regular 14 point in WordPerfect 8.

S/
Percy Hogan, Jr., Pro se
302 Farren Street
Sewickley, PA 15143
412-749-5388

Received July 1, 1994
Processing & Distribution Phoenix, AZ 85026

Received July 5, 1994
Examination, Phoenix AZ

Date: 6/29/94
Our Ref:
Subject: CASUAL TERMINATION/RESIGNATION
To: MARCIA KRAL
MDO OFFICE

PLEASE COMPLETE THE FOLLOWING INFORMATION REGARDING THE CASUAL WHO HAS BEEN TERMINATED/RESIGNED:

NAME Hogan, Percy SSN 436-68-8838 DES/ACT 61-0
P/L 331 LAST DAY WORKED 6/24/94
RESIGNATION ____ TERMINATION √
ACCIDENTS: ____ YES √ NO IF SO: ____
___ INDUSTRIAL ____ VEHICLE
REASON FOR TERMINATION (COMPLETE BOTTOM PORTION) Casual Appointments expired for 94
WOULD YOU RECOMMEND THIS EMPLOYEE FOR REHIRE? ____ YES, √ NO
IF NOT, EXPLAIN BRIEFLY: Marginal - requires constant supervision, wanders away from work area in the absence of supervision
PRINTED NAME OF SUPERVISOR COMPLETING FORM
Simon Molina, SDO

SIGNATURE S/ Simon Molina DATE 6/29/94

EEO Investigative Affidavit
(*Witness*)

Simon Melendez Molina

On January 1994, I met with Percy Hogan. I advised him that his performance are unacceptable, that he wandered from his work area too many times. I told him that unless I stood in the area he would stray away when I left the area. Therefore, I could not give him a letter of recommendation. Percy assured me that if I gave him a letter of recommendation, I would not be disappointed, that he would dramatically improve his work habits. I agreed to give him a positive letter (exhibit A). Mr. Hogan did dramatically improve for several weeks, but then reverted back to marginal performance; not requiring termination but not a candidate for a letter of recommendation either. I advised Percy that upon the end of his casual appointment for 1994, I would not recommend him. I gave final letters of recommendation to three other casuals, but not to Percy Hogan and not to one other casual who also was marginal (exhibit B). When a form arrived at my mail holdout asking if I would recommend Mr. Hogan for carrier position, I resounded in the appropriate negative. I also stated the reason why. Percy filed an EEO complaint alleging discrimination because of race. I did not deny employment as career city letter carrier to Percy Hogan. My job duties do not include hiring of employees. I did give Percy Hogan a negative recommendation based on his marginal performance with me. The personnel office then made the decision not to hire Percy Hogan. My negative recommendation was based on performance only. Discrimination was never a factor. I was Percy Hogan's main supervisor, therefore, he was under my supervision most of the time. Other supervisors, Johnny Camden, and Al Hansen had more positive experience with Percy Hogan., judging from their letters of recommendation, at the times he worked for them. Based on that, I agreed to pull back the negative letter and issue a positive one as a resolvement of the E.E.O. My offer still remains. On September 8th, 1994 I met with Elaine Jones, E.E.O. Investigator and Percy Hogan. I agreed to pull back the negative letter and issue a positive one as a resolvement of the E.E.O.

S/ Simon Molina 3/08/95

EEO Settlement-Counseling Process

I, Percy Hogan, do hereby voluntarily withdraw my request for EEO counseling based on the stipilation(s) that:

1) Supervisor Simon Molina will remove unfavorable evaluatin dated 6/29/94 from Counselor Officeal Personnal Folder (OPF). 2) Supervieow Simon Molina will reissue a favorable evaliatoin date 9/21/92. Personnel will process Counseler Applicaiton according to their procedures.

S/ Simon Molina 9/21/94

Date: 9/21/94
Our Ref:
Subject: CASUAL TERMINATION/RESIGNATION
To: EXAMINATIONS/HIRING
RIO SALADO FACILITY

PLEASE COMPLETE THE FOLLOWING INFORMATION REGARDING THE CASUAL WHO HAS BEEN TERMINATED/RESIGNED:

NAME Hogan, Percy SSN 436-68-8838
DES/ACT 61-0
P/L 331 LAST DAY WORKED 6/24/94
RESIGNATION _____ TERMINATION √
ACCIDENTS: ____ YES √ NO IF SO: _________
___ INDUSTRIAL _______ VEHICLE
REASON FOR TERMINATION (COMPLETE BOTTOM PORTION) Casual Appointments expired for 94
WOULD YOU RECOMMEND THIS EMPLOYEE FOR REHIRE? √ YES ___ NO
IF NOT, EXPLAIN BRIEFLY: ________________________
PRINTED NAME OF SUPERVISOR COMPLETING FORM
Simon Molina, SDO

SIGNATURE S/ Simon Molina DATE 6/29/94

EEO Investigative Affidavit
(*Witness*)

Janice L. Boulden

Attached please find a copy of the VRA instructions provided to the Postmasters and Managers, Distribution Operations. These instructions specifically stated "Do not send applications for those you do not recommend". It was the full responsibility of the supervisors or managers to made a determination on an employee's overall work performance as to whether they would recommend a employee or not for career conversion under the VRA provisions. Personnel did not involve itself in these decisions. We only processed the applications of the employees who were recommended. Mr. Percy Hogan was not recommended. There were no other factors taken into consideration.

S/ Janice L. Boulden 08-29-95

Saturday, August 05, 2000

To whom it may concern, my name is Wayne T. Rowe. I am a 38 year old white male who has worked for the US Postal Service since Jan. 5th 1985. Between the dates of June 1993 and June 1994, I worked with a casual employee named Percy Hogan. We worked distributing mostly second class mail in the 073 operation, of which Simone Molina was our immediate Supervisor.

When I think back on this time, I remember things where not going so good in our section. Moral was very low among the regular career employees. There was talk of abolishing our bid jobs and changing our start time to 3:30 p.m. The start time change meant that I and some other people in my area would lose 8 hours of Sunday premium pay per week. Needless to say none of the regular employees where happy about the situation. As a result, I believe overall productivity in our area was down at the time.

All of this had little effect on the casual employees as they didn't have bid jobs. Their start times and the number of hours worked during the week where at the complete discretion of our immediate supervisor Simone Molina. Casual employees were supposed to have two days off per week. But, in reality supervisors could work them as they saw fit. The casual's need and desires for time off (even if requested in advance) came in a distant second to the needs of our department and seemed not to matter. Because, there was,no routine postal procedure or postal regulation that defined precisely what a supervisor could not do with a casual. The post office used the casuals to get the mail out against the productivity slow down.

I am a little ashamed to admit it because the regular career employees where not doing their fare share of the work. But, the post office really depended on the casual employees to get the mail out. All of the casual employees in our area where above average workers. At the time I attributed the casual's high work ethics to the fact that if they were deemed unproductive they could easily be terminated with little recourse. I personally witnessed a casual employee being walked off the floor and fired for refusing to work two hours of overtime.

Then there was Percy Hogan a black man who was also a casual employee. It wouldn't be fare to describe him as an above average worker because he was really an exceptional worker. I am not exaggerating when I say he did twice as much work as the average worker. This is not just a subjective opinion. Each piece of equipment that held mail to be worked had a weight tag on it and after you where finished working that mail you would put the tag on your case. Nobody ever had more weight tags on their case than Percy Hogan. It is unnerving to watch a guy work twice as hard as you and make less than half the hourly wage as you. Not only did Percy Hogan work hard but long hours. At one point I believe he worked seven days a week for about a month.

It was no secret that Percy Hogan wanted to be a career employee for the US Postal Service and I believe this was a motivating factor in his exceptional performance at the Post Office. As I recall, I don't even remember Percy calling in sick once.

As regular employees, we had bid jobs that stated we were manual clerks (clerks that sorted mail by hand) and what pay location we should work in. Thus, it was not as easy to put us in another area, as say casuals who didn't have bid jobs. Casuals were told to do everything and were sent to work everywhere in the building. But, the fact is nobody wanted to leave the relatively comfortable confides of our area. Because every time a casual was sent out, he had to run like the devil to put out a fire. That is to say for example if one of the automated machines went down or maybe it was left unattended causing an overflow of mail, casuals were called to the rescue. This routinely happened every night and the routine response was whenever there was a problem send a casual. In the beginning all the casuals would be sent out to put these fires. However over the course of a year, progressively things changed. When ever there was a problem and people had to be sent outside of our area, it would always be Percy Hogan or Percy Hogan and Kyle Johnson. The other casuals would remain in our area with headsets on listening to music and tranquilly casing mail. The work for a casual outside our area usually physically demanding and always intimidating. It was hard and sometimes dangerous work and nobody wanted to do it. The only two black guys in our unit were sent every time, over and over again. While the other casuals where sent only if these two couldn't handle the problem alone. Then of course, Simone would make them stay in our unit, for overtime, to finish getting out all the mail.

Then it was announced that any casual who was currently employed by the Postal Service, who was a veteran and who had passed the entrance exam would be eligible to apply for a career position with the US Postal Service. It is my understanding that Percy Hogan applied for a career position at the Post Office and was denied a job because our immediate supervisor Simone Molina described Percy as a marginal employee. Nothing could be further from the truth.

Do I believe that Percy Hogan was discriminated against? Yes, I do!! Do I believe that Simone Molina is prejudiced against black people in general and Percy Hogan in particular?? Yes, I do!!

In the two years that Simone Molina was my supervisor I never heard Simone say anything nice about black people. When he spoke of blacks it was always negative. Case in point, one day an older black women in our area named Joyce came upon a magazine in our area. I think it was TIME magazine and the cover story said "Oldest human skeleton found in Africa". Joyce started showing the magazine to everyone that passed by saying See!! I always knew that Adam and Eve were BLACK!!!!". When

Simone saw what was going on he became visually upset. Instead of confronting Joyce he walked over to me. He asked me if I believe it was true. I told Simon I didn't know and that I really didn't care. It really wasn't an issue that I cared about. I noticed that Simon was shaking and upset. I suggested that he leave the area and calm down. He took my advice but as he turned to walk away I heard him say "those people make me sick".

It is hard to say if this instance was the defining factor that lead me to believe that Simone Molina is prejudiced against black people. It is likely an accumulation of comments and things that happened over the two years I worked for him.

It is hard for me to adequately describe how outrageous it is for Simone to say that Percy was a marginal employee who doesn't deserve a job with the US postal service when he was literally the best employee in our area. I would like to believe that Simon is just prejudiced against blacks and lost all sense of objectivity when dealing with Percy. But, I don't think that was the case. Simone was all to aware that Percy was an outstanding worker. That is why Simone allowed Percy to work such long hours. It would have been very easy for Simone to scale back Percy's work hours if he thought he was unproductive. The kind of maliciousness perpetrated here can only be called racism.

Sincerely,
S/Wayne T. Rowe

May 27, 1994

Ref: Mr. Percy Hogan 436-68-8838

To Whom It May Concern:

Mr. Percy Hogan has worked under my direction for approximately 1 year. Mr Hogan gets along well with his peers and supervisors.

Percy works in a safe manner and follows direction with no problems. Mr. Hogan can work without direct supervision because he takes the initiative to get the job done.

Mr. Hogan's attendance is excellent, someone you can count on to be there. Percy has an easy manner and a soft approach when dealing with people. I highly recommend Mr. Hogan for any position that would allow us to keep him in the Postal Service.

S/

Al Hansen
Supervisor Distribution Operations

I am Albert Hansen, a white male Postal Supervisor with the Phoenix USPS. This affidavit is in support of Percy Hogan. At the time Percy Hogan was at the Rio Salado Facility I was the tour-one supervisor and my work hours were 9:30 PM to 6:00 AM. My responsibility was all flat operations at the Rio Salado Facility. Percy Hogan worked under my supervision from 4 to 6 hours a work day depending if overtime was called.

I had direct observations, contact and knowledge of Percy Hogan's work habits. This is because the first week that the casuals were hired for Rio Salado, Supervisor Molina, tour-three, and myself would observe the casuals. During the first week Supervisor Molina stated to me that Percy Hogan needs to be watched and he, Percy Hogan, would be trouble. Supervisor Molina did not elaborate further.

After that comment I made many walkthroughs and observations of all the casuals but, with a keen eye for Percy Hogan. Upon my observations and contact with Percy Hogan I made the following observations.

Percy Hogan was always at his work station. He always seemed to be there.

The other casuals followed Percy Hogan's work habits which were a constant high-volume wherever he worked.

Excellent attendance.

Got along well his peers and it appeared he got along well with all his supervisors.

Percy Hogan has a warm and pleasant tone when speaking and I found this along with his excellent work habits one of the reasons that the other casuals would follow.

Percy Hogan not only had excellent work and attendance habits he appeared to have excellent leadership skills. Percy Hogan was used on several occasions to instruct casuals on the manual flat distribution cases.

I was approached by the Rio Salado Manager John Moore who told me what an excellent job that Percy Hogan had done in setting up the Priority parcel mail operation and showing the casuals the setup. On many occasions I used Percy Hogan and Kyle Johnson to clean up an area such as the maze, a separation and distribution area, so I would not have to shut down a flat sorter machine.

Percy Hogan filled all of the qualities and skills for working for the USPS, which is why I gave him a letter of recommendation for a carrier position he was applying for.

Percy Hogan never lost his temper and never challenged any orders. Percy Hogan was always trying to please and do an excellent job. When I heard that Percy Hogan was not to be rehired in some capacity, I was shocked. Percy Hogan was a self motivated employee, not needing direct supervision. The USPS could use more employees like Percy Hogan.

Many times I stood in a position where employees could not observe me, but I could see them, unless they looked directly at me. My observations of Percy Hogan was that he was self motivated and did not need direct supervision.

Percy Hogan was a casual employee for the USPS. Casuals are temporary hires for 90 days and can be rehired for another 90 days. Casuals have no representation and no voice to speak for them.

When I first came to Phoenix in 1993 and was assigned to the Rio Salado Facility I noticed that tour-three was predominantly supervised by Hispanic males. They had what I call a conquistador attitude which is I am the boss.

S/ Albert Hansen 8/15/00

Received September 8, 1994
EEO Office Phoenix, AZ 85025-9411

September 1, 1994

To Whom It May Concern:

We, the undersigned, have worked with Percy Hogan, for the past year in the manual cases. He is a hard and thorough worker. Percy was always there when help was needed. He helped the new casuals with the procedures in the sections when they were assigned. He tried to never leave mail, and always tried to rally "the troops" on that last push at midnight.

Percy was a pleasure to work with. He was always a gentleman, very up. He never had a bad word for anyone. Percy will be missed by all.

S/ Barbara Hansen

I, Barbara Hansen, a white female, have worked for the U.S.P.S. for approximately 24 years, in various positions.

This affidavit is in support of Percy Hogan, a causal, who worked in the manual flat section, Rio Salado Facility in Phoenix, AZ.

When I was brought into the manul flat section, Percy Hogan was the first person that Supervisor Molina introduced me to. Percy Hogan was professional, knowledgeable about the duties to be performed. His help and guidance helped my transition into the section. If had a problem or question I would always go to Percy and get the answers, and if he didn't know, he knew where to find out.

Once I had been in the manual flat for a month or so, I began to realize and appreciate how professional, effective and knowledgeable Percy was concerning the casuals' role in the section, and in the overall operation. He got things done in a timely manner. He was a hard worker with good work ethics. He was a good example for the casuals as well as the regulars in the section. Everyone, including the supervisors, seemed to depend on Percy to get the job done. When the supervisor would come into the section to give directions, they would consult with Percy, who was in his work station, as to whether we would "clean up" by the end of our shift or would overtime be required. I heard many of these conversations, as I usually work next ro him. He continually cased more mail than anyone else in the section. To get more productivity out of us, he would "race" us to see who could finish first and complete more cages.

After awhile it became apparent that when Supervisor Molina would come to move employees to another area, it would be Percy Hogan and Kyle Johnson. The Hispanic employees would always be the last to go and the first to come back to the section. I knew that as long as Percy and Kyle were there, I would never have to do the jobs that they had to do. When the new casuals came into the sections, Percy Hogan did most of the training.

It was about this time, I witnessed the termination ofThomas Corso. Thomas was terminated for not working overtime (2 hrs) after an 8 hour day. After standing for 8 hrs, Thomas's ankles were swollen, and he went home. When he returned to work the following day, Supervisor Molina took him off the workroom floor, into the office and terminated him. He came back out on the floor to collect his belongings, he was crying. Supervisor Molina was defensive and would not allow Thomas to talk with anyone. We spoke a few words and then he left.

There was a posting for veterans for permanent jobs in the post office, that Percy was qualified for. Everyone was sure that he would get a job. When discussing the position Percy told me how Supervisor Molina helped him with the application, and the general clerk André Bolenger was typing up the resumé. Again, everyone in the section was surprised when he did not get the job.

During the Christmas season, I believe that Percy worked 28 days straight, sometimes 10 to 12 hrs a day. At that time another casual, a hispanic, got days off.

When Supervisor Molina spoke with a hispanic employee, male or female, he was more open and receptive to them. He also stood nearer them. He would also speak Spanish when giving directions or just chatting. When speaking to whites or blacks, he would keep his distance. You knew there was a difference between the Races.

I was disturbed and upset, as well as the rest of section, when we learned what Supervisor Molina had written and ultimately done to Percy. We all felt he had been given a bad rap, and that Percy deserved better. We felt that Percy was being singled out. We all agreed that Percy would have made a good employee of the U.S.P.S.

On Sept 1994, I authored the letter, that the regular employees of the section readily signed. We did this to show our support of Percy and hoped management would reconsider its decision.

I am writing this affidavit in support of Percy Hogan. I strongly feel that he is a victim of racial discrimination.

By writing this affidavit I fear retaliation and possible loss of my job.

S/____________________________
Barbara A. Hansen 8/15/00

Received September 8, 1994
EEO Office Phoenix, AZ 85026-9411

August 29, 1994

To whom it may concern,

I worked as a casual with Percy Hogan under the supervision of Simon Molina, at Rio Salado, from 06-93 to 06-94.

In late October 1993 Simon took Hogan and me into his office, separately - but on the same day, and made serious accusations concerning our work performance. Later that evening, by chance, Hogan and I compared notes, I guess because we were both a little shocked. Simon accused Hogan of slowing down the crew to get more over - time, which is impossible to do. That he was "Sabotaging" Simon's operation and did he know that Simon had the power to fire him with no questions asked. Simon accused me of, among other things, "Milking the clock" to get more over - time. Simon shouted, ranted and raved at both of us, threatening our jobs if we didn't straighten out.

Hogan and I agreed that we were singled out, not for any reason other than being black. We worked just as hard, just as good or better than the others who were not called in and terrorized unjustly. Yes, terrorized, because we valued our jobs and our families depended on this job. We worked hard and wanted to impress our co-workers and superiors because we wanted a permanent job with the Post Office. We have both suffered from racism before and know what it is. We were also convinced that Simon's accusations were not meant as guidance but to set us up to be fired.

After that incident, we resolved to double our efforts, work hard every day, be on time, accomplish all assignments and help our co-workers. For the next eight months or so, we worked harder faster, longer and generally produced more quality work than any of the other employees, casual or regular, for fear that Simon's racism might raise it's ugly head and adversely affect our jobs. In fact, after the Oct. 1993 accusations, Simon said nothing more to either of us concerning work performance for the remaining eight months. This indicated that he was at least satisfied.

Simon was barely civil with me and Hogan even when he assigned specific duties. Rarely would he talk to us for any reason but he would stand next to the work area and speak to the others in Spanish for 10 or 15 minutes at a time. Sometimes he would arrange their time off so that they could see the Carbahol fight or something together. Never for Hogan or me. But when it was time to go to the maze, or sweep and load the FSM machines or any hard, dirty job that nobody wanted to do, Simon would send Hogan or me. In our minds we knew that it was blatant discrimination but we did the task at hand with a smile. We were continuously threatened with the fact that we were casuals and as such, any supervisor could terminate us with little or no reason.

Like I said earlier, I worked side by side with Hogan, everyday for one whole year and to hear that Simon said Hogan was a marginal employee is far from the truth. He never wandered away from the work area - as if in a dream or something. If he had, I can assure you that Simon would have fired him on the spot. He was looking for just that. Please ask all of the regular employees in the Manual Flat Sorter section (074 - 075) about our group of casuals. They all said we were the best group of casuals that they ever had and that we would be hard to replace. Hogan was the best or one of the best in our group. In fact, if a casual was needed, Simon or one of the other supervisors would almost always send him because he was very reliable, a good worker, quick learner and got along well with everyone. Plus, Hogan was always there. No days off - seven days a week averaging 75 hours per week. Once I think he worked 90 days straight. Does that sound like a marginal employee? If he was marginal then many of the others employees should have been fired. No, they were not fired but had they been black, maybe. In my one year in the Flat Sorter Section at Rio (tour 3) only three casuals were fired that I know of. Two Black Americans and one Cuban American (also Black).

I am writing this for two reasons. First, because Hogan is an outstanding individual, a good worker, kind and gentle when dealing with others and I was proud to work with him.

Second, Simon is highly educated and intelligent and would not want others to know that he had a problem with racism, consequently, he would try to hide it. After that very difficult year, it would be ironic and a great injustice to Hogan and to the Post Office if Simon succeeded.

Sincerely
S/ Kyle Johnson

ATTENTION ALL CURRENT CASUALS & TEs

Current casuals & TEs who meet the following criteria and are interested in career carrier appointments within Arizona should review the following information and instructions.

Those veterans who are **30% or more disabled OR Post Vietnam* OR Vietnam era* AND** who

- worked satisfactorily in a casual or TE appointment for at least 60 days and are currently on rolls
- meet applicable qualification requirements including examination, background/suitability check for employment and criminal history, physical examination.
- have a satisfactory discharge from the military.

Post Vietnam Era veterans entered active duty as a member of the Armed Forces after May 7, 1975 and have served for a period of more than 180 days active duty. NOTE: the 180-day service requirement does not apply to veterans separated from active duty because of a service-connected disability.

Reserve and guard members who served for less than 181 days active duty during Operation Desert Shield/Storm are included if they meet the following requirements:

- ordered to active duty under section 672a, d, or g, 673, or 673b of title 10
- performed active duty during the Persian Gulf War
- separated with a satisfactory discharge

Vietnam Era veterans served on active duty any time during August 5, 1964 to May 7, 1975.

REQUIREMENTS: You MUST complete and submit the following to your POSTMASTER
Plant/AMC employees should send to the Postmaster of their respective cities) If you have questions, please contact your Postmaster - DO NOT CALL PERSONNEL:

PS Form 2591, Application for Employment, plus **addendums**
Copy of test score (or entrance card if test not yet taken)
If you are a disabled veteran who has a service-connected disability of 30% or more, you will need to provide a letter from the Veteran's Administration dated within ONE year.
If you are a Post-Vietnam or Vietnam Era veteran, you will need to provide a copy of your DD214 with your type of discharge. Any discharge other than honorable will have to be investigated prior to a determination on whether conversion to career will be made.
If not currently authorized to drive a government vehicle, a certified 5-year driving abstract must be provided.

ALL APPLICABLE ITEMS MUST BE SUBMITTED TO
YOUR POSTMASTER
NO LATER THAN MAY 27,1994

Selections to career positions will be based on current and past work performance, with priority consideration given to current carrier casuals and carrier TEs.

The Postal Service is an Equal Opportunity Employer

VRA POSTING FOR CARRIERS

Post the announcement as soon as you receive it

Contact the Union with information, also

You may want to personally copy it for all of your carrier TES/casuals

Accept applications from current casuals OR Tes ONLY:
- Contact Vivian at 223-3623 (Employment Office) regarding number of addendum sheets for applications and colored labels
- Use new applications - PS Form 2591, November, 1993
- Complete application with complete addresses include street address, city and state and ZIP codes
- Under Position Applied for - put Carrier under VRA
- Include 10 year work history - annotatate non-work times on application
- They must include test score AND DD214 or Disability letter
- If non-driving now, must get certified 5-year driving abstract

After acceptance:
- Keep them all together until 5/27/94 OR until all are received
- Place colored label on each application
- Do cover note stating what is included and list all you would recommend for career appointment and those you did not recommend
- DO NOT send applications for those you do not recommend
- Forward to Personnel, ATTN: Janice Boulden

If you do not recommend someone, we will refer the person back to your office for the reason

Phoenix Plant/AMC will send theirs to Postmaster in Phoenix; Tucson Plant will send their to Postmaster in Tucson. The PM in Phoenix and Tucson should forward those from the Plant to Terri Lantych - after all received

If they have 60 days but have NOT EVER taken a carrier test, employee needs to include a completed yellow test card with the application, asking for a non-competitive 470 exam

Employees should NOT call Personnel with questions. We wish to receive calls only from the PM or their designee.

Pull the posting on 5/27/94. This is a ONE TIME opportunity under this process.

Received January 14, 1994
Processing & Distribution Phoenix, AZ 85026

Date: January 11, 1994
Our Ref: SM:arb
Subject: RECOMMENDATION FOR CASUAL EMPLOYEE

To: Marcia Kral
Secretary
Distributions Operations

This letter is to recommend Percy Hogan (436-68-8838) for the position of Transitional Employee.

Mr. Percy Hogan is a hard working Casual who has demonstrated his ability to learn quickly. Mr. Hogan is very versatile and hence can perform very well in a variety of situations. His best assets are his versatility and adaptability. Mr. Hogan has a pleasant personality and gets along well with everyone. Mr. Hogan also has remarkable resiliency. He will work 12 hours or better and be ready to do it again the next day.

I recommend Mr. Perry Hogan without reservations. He is a positive asset to the U.S. Postal Service.

S/ Simon Molina
Supervisor, Distribution Operations

Filed September 14, 2000
Clerk US District Court
District of Arizona

Percy Hogan, Jr.
302 Farren Street
Sewickley, PA 15143
(412) 749-5388
Plaintiff, Pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PERCY J. HOGAN, Plaintiff,	)	NO. CV 96-1189 PHX ROS (WGY)
vs.	)	
MARVIN T. RUNYON, JR., Postmaster General, UNITED STATES POSTAL SERVICE, SIMON MOLINA, et al.	)	**JURY TRIAL DEMANDED**

August 26, 2000, Motion for reconsideration denied.
S/
William G. Young, District Judge

PLAINTIFF'S PETITION FOR RECONSIDERATION

Plaintiff, Percy Hogan, Jr., requests that the court reconsider its "Memorandum and Order," filed on July 3, 2000, for the following reasons:

1. Motions for Reconsideration are appropriate in instances where the court has (1) patently misunderstood a party, (2) has made a decision outside the adversarial issues presented to the court, (3) has made an error not of reasoning but of apprehension, (4) where there has been a controlling or significant change in the law, or (5) facts since the submission of the issue to the court. See Above the Belt, 99 F.R.D. at 101, cited in United States v. Aetna Casualty and Surety Co., 1991 WL 495733. See Docket #98, filed April 5, 1999.

A. FACTS SINCE THE SUBMISSION OF THE ISSUE TO THE COURT

Attached hereto and made a part of the record in the instances are the following affidavits:

1. Affidavit of Wayne T. Rowe, dated August 5, 2000. ***Exhibit A.***
2. Affidavit of Al Hansen, dated August 15, 2000 and letter of Al Hansen, dated May 27,1994. ***Exhibit B***
3. Affidavit of Barbara Hansen, dated August 15, 2000, and letter of Barbara Hansen, dated September 1, 1994.. ***Exhibit C***

The above affidavits show:

1. Facts supporting plaintiff's contention that he experienced racial discrimination in the workplace;
2. Facts supporting plaintiff's contention that his supervisor, Simon Molina, was abusive toward plaintiff and that plaintiff was forced to work in a hostile environment;
3. Facts supporting plaintiff's contention that plaintiff's time off concerns were reasonable;
4. that the behavior of plaintiff's supervisor, Simon Molina, in speaking Spanish to plaintiff's coworkers shows racial discrimination;
5. that plaintiff's supervisor, Simon Molina, often lied about plaintiff's work performance,
6. that plaintiff's supervisor, Simon Molina, harbored racial prejudice against blacks,
7. that the unfavorable work evaluation of plaintiff's supervisor, Simon Molina, was a pretext to unlawful racial discrimination.

B. THE COURT PATENTLY MISUNDERSTOOD PLAINTIFF'S CONTENTIONS

Attached hereto and marked as ***Exhibit D*** are pages 40, 66 - 68 and 104 - 109 of plaintiff deposition, dated October 28, 1998. Those pages show that the court misconstrued plaintiff's testimony concerning the issue of time off from work. Plaintiff's testimony shows a genuine fear that plaintiff's supervisor, Simon Molina, would fire plaintiff if plaintiff asked for time off. The fact that Simon Molina fired plaintiff's coworker, Thomas Coro, supports plaintiff's concerns. The Affidavit of Barbara Hansen (Exhibit C) supports plaintiff's contentions on this issue.

Attached hereto and marked as ***Exhibit E*** is the Affidavit of Percy Hogan, dated March 1, 1999 (Docket Entry # 92), showing the following:

1. that defendant discriminated against plaintiff and forced plaintiff to work in a hostile environment by forcing plaintiff to work many hours more than all similarly situated workers;
2. that Simon Molina lied in describing plaintiff as a marginal worker;
3. and that Simon Molina's evaluation of plaintiff was a pretext for unlawful racial discrimination, since it is

inconsistent for Molina to believe that plaintiff was a marginal employee and, simultaneously, insist that plaintiff be there at every critical moment, including plaintiff's off days.

C. THE COURT MADE A DECISION OUTSIDE THE ADVERSARIAL ISSUES PRESENTED TO THE COURT

Among the workers in plaintiff's unit, plaintiff alone met all of the qualifications to apply for the VRA position. This fact is confirmed by defendant's EEO report. Those qualifications, as set forth in ***Exhibit F***, were as follows:

1. Current casual desiring to work as a carrier
2. Military veteran for specified period
3. Having worked 60 days for defendant in a casual or temporary position
4. Satisfactory military discharge

The court somehow misconstrued the issue as whether plaintiff qualified for the position. The issue which is before the court is whether plaintiff's supervisor, Simon Molina, blocked plaintiff application for the position to prevent plaintiff from being considered for the position. Plaintiff qualifications for the position were never evaluated by defendant. Attempting to evaluate plaintiff's qualifications for the position takes the court's analysis too far. Plaintiff never got to the point of being evaluated for the position. Plaintiff's application was blocked by Simon Molina before an evaluation of plaintiff's qualifications for the position could be made. The court's decision should have focused on plaintiff's qualifications to apply for the VRA position. Human Resources Specialist, Janice Boulden's affidavit, dated August 29,1995, indicates that Simon Molina's negative recommendation for rehire was the sole reason that plaintiff's application was not processed.

WHEREFORE, plaintiff requests that the court reconsider its July 3, 2000 "Memorandum and Order."

Respectfully submitted,

S/

PERCY HOGAN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PERCY HOGAN,)
Plaintiff,) NO. CV 96-1189 PHX
) ROS(WGY)
vs.)
MARVIN T. RUNYON, JR.,)
Postmaster General,)
UNITED STATES POSTAL)
SERVICE, SIMON MOLINA,)
et al.)

CERTIFICATE OF SERVICE

This certifies that, on 8-17-, 2000, a true and correct copy of the within PLAINTIFF'S PETITION FOR RECONSIDERATION was mailed to the persons listed below, by First Class mail, postage prepaid, as follows:

John Maryfield, Esquire
Assistant U.S. Attorney
4000 U.S. Courthouse
230 North First Avenue
Phoenix, AZ 85025
(602) 514-7500

A complete duplicate copy of the above has been forwarded directly to the following:

Marie Bell, Deputy Clerk
United States District Court
Clerk's Office, Suite 2300

1 Courthouse Way
Boston, MA 02210

S/
Percy Hogan
302 Farren Street
Sewickley, PA 15143
(412) 749-5388